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Corporate Interiors, Inc. and Carpenters District Council of Kansas City & Vicinity affiliated with United Brotherhood Of Carpenters and Joiners of America. Cases 17-CA-20750 and 17-CA-20979

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On November 23, 2001, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party Union filed cross-exceptions, a supporting brief and a brief answering the Respondent's exceptions.

The Board has considered the decision and the record in light of the exceptions,¹ cross-exceptions² and briefs and has decided to affirm the judge's rulings, findings,³

¹ The Respondent filed no exceptions to the judge's findings that it violated Sec. 8(a)(1) by Owner Roger Klima's remarks to employees during the employee meeting held on October 2, 2000; by questioning applicants Lee Murphy, David Wilson and James Hide whether they were union organizers; by instructing Murphy not to tell the Union that he had been hired; by Job Superintendent Mumau's threat to Murphy to have union organizer Crawford arrested if he entered the Respondent's Metcalf jobsite; by Mumau's solicitation of surveillance by requesting Murphy for notification if organizer Crawford entered its Metcalf jobsite; and by Mumau's forcing off the Metcalf jobsite union organizers who were present with the permission of the general contractor.

² There were no exceptions to the judge's dismissal of the consolidated complaint allegations involving Kevin Sachuvich, or to allegations that Klima attempted to hit picketers with his automobile and unlawfully changed hiring practices by placing a 2-week limit on the viability of employment applications.

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings of the Sec. 8(a)(3) refusal-to-hire/consider violations, Chairman Battista does not rely on the judge's discussion of the dissenting opinion of Members Liebman and Walsh in *Aztech Electric Co.*, 335 NLRB 260 (2001). Nor does Chairman Battista rely on the judge's discussion of the asserted Sec. 7 right of three of the September 12 union applicants to wear "anti-Respondent" T-shirts. The judge found pretextual the Respondent's assertion that it refused to hire these applicants because of the "rude" message on the T-shirts. Accordingly, because the Respondent did not, in fact, base its refusal-to-hire decision on the wearing of the T-shirts, Chairman Bat-

and conclusions as modified and to adopt the recommended Order as modified.⁴

The Charging Party cross-excepts to the judge's finding that the Respondent's owner, during an office phone call and with an employee standing nearby, did not violate Section 8(a)(1) by threatening a union organizer with violence. We find merit in the cross-exception and find the violation.

Lee Murphy was an employee of the Respondent when, on May 11, 2000, he was instructed to report to the Respondent's main office for a new work assignment. As he entered the office, the Respondent's owner, Roger Klima, had just received a two-way cell phone call from his job superintendent, Brent Mumau, who informed Klima that union organizer Mike Crawford was on the Respondent's jobsite.⁵ With Murphy standing "about a foot away from [Klima]," he (Klima) told the superintendent "to tell Mike Crawford to get the fuck off his job or he was going to blow his head off." Murphy overheard Klima's broadcast threat, as did Crawford (who was standing next to Mumau).

The judge found that there was no evidence that Klima intended his radio conversation with the job superintendent to be overheard by anyone else and concluded, therefore, that the conversation was not "directed to an employee or union agent . . ." Accordingly, he dismissed the complaint allegation that Klima threatened a union agent with physical harm in violation of Section 8(a)(1). We reverse.

The underlying premise of the judge's dismissal of this allegation is that it is "much akin to the old question of whether a tree falling in the forest makes a sound if no one is present to hear it." Stated otherwise, the judge concluded that since Klima's threat to "blow Crawford's head off" was not directed at Murphy or Crawford, but was intended only for Mumau's ears, it did not violate Section 8(a)(1).

This is not the relevant inquiry. It is well-established Board law that "an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee

tista does not rely on the judge's comments regarding the applicants' asserted Sec. 7 rights to wear the T-shirts.

Chairman Battista agrees that the layoff of Lee Murphy was unlawful. He also notes that the judge discredited Klima's assertion that he attempted to recall Murphy a week after his layoff. However, Chairman Battista finds that Klima did raise an issue as to whether Murphy obtained interim work beginning on the day after his layoff. Chairman Battista views this latter issue as a remedial one which the Respondent may raise in the compliance stage of this proceeding.

⁴ We will substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

⁵ The parties alternately refer to this two-way phone as a radio.

rights.” *Unbelievable, Inc.*, 323 NLRB 815, 816 (1997). The intent or motive of the employer is not relevant to this analysis. *Id.* (finding restaurant supervisor’s coercive threat, overheard by a hidden busboy, violative of Section 8(a)(1) regardless of supervisor’s lack of knowledge of busboy’s presence) (citing *Williams Motor Transfer*, 284 NLRB 1496, 1499 (1987) (finding company president’s threats, overheard by a driver, unlawful regardless of president’s intent or whether he was aware of driver’s presence); *Perko’s Inc.*, 236 NLRB 884 fn. 2 (1978) (finding company president’s threats, overheard by a waitress seated nearby, unlawful notwithstanding president’s lack of awareness of waitress’ presence)). Klima’s threat of violence toward a union organizer in the presence of Murphy had a tendency to interfere with the free exercise of employee rights, whether or not Klima was aware of Murphy’s presence and whether or not he intended Murphy to hear the threat. Therefore, we conclude that the Respondent violated Section 8(a)(1) as alleged.⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Corporate Interiors, Inc., Olathe, Kansas, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 1(g) and reletter the subsequent paragraphs.

“(g) Threatening union organizers with violence in the presence of employees.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. September 30, 2003

Robert J. Battista, Chairman

⁶ In joining his colleagues on this point, Chairman Battista agrees that the factor of intent is irrelevant. He finds it unnecessary to pass on whether the factor of “awareness of presence” is irrelevant. In this regard, he notes that Murphy was one foot away from Klima when Klima made the threat, and Klima was obviously aware of Murphy’s presence.

The Charging Party also cross-excepts to the judge’s dismissal of an 8(a)(1) allegation that Klima threatened union organizers on one occasion that “one of these days I’m going to snap,” and on another occasion that “they would not like it when he snapped.” In light of the 8(a)(1) threat that we have found above, the finding of additional violations based on Klima’s “going to snap” remarks would be cumulative and would not affect the Order. Accordingly, we find it unnecessary to pass on this cross-exception.

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the

National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT call the police to seek the removal of union organizers attempting to apply for jobs.

WE WILL NOT call the police to seek the arrest and/or removal of pickets engaged in protected concerted activity.

WE WILL NOT attempt to videotape and videotape pickets.

WE WILL NOT interrogate employee-applicants and employees about their union membership and sympathies.

WE WILL NOT order employees not to communicate with the Union.

WE WILL NOT threaten union organizers/employee applicants with arrest in the presence of employees.

WE WILL NOT order employee-applicants to leave our jobsite.

WE WILL NOT threaten union organizers with violence in the presence of employees.

WE WILL NOT solicit employees to engage in surveillance of protected, concerted activity and union activity.

WE WILL NOT inform employees that union organizers would be arrested for engaging in lawful picketing.

WE WILL NOT instruct employees to assist in our efforts to call the police about union organizers.

WE WILL NOT threaten to interfere with picketing.

WE WILL NOT attempt to convince police officers to arrest pickets, and impliedly threaten to take personal action against pickets.

WE WILL NOT harass picketers by turning on a sprinkler system where pickets stand.

WE WILL NOT contact the police and cause the arrest of a picket.

WE WILL NOT tell employees that we have changed our hiring procedure in order to avoid hiring union affiliated employees.

WE WILL NOT tell employees that we would not hire union affiliated employees.

WE WILL NOT tell our employees that our rules will be more strictly enforced because of the Union.

WE WILL NOT create an impression among our employees that their union activities and protected concerted activities are under surveillance.

WE WILL NOT interfere with union activity by forcing union organizers to leave the jobsite.

WE WILL NOT discriminatorily lay off or terminate employees because of their engaging in union activity, or other protected concerted activity.

WE WILL NOT refuse to consider for employment or refuse to employ job applicants because they are members of the Union or organizers for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Lee Murphy reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position without prejudice to his seniority rights or any other rights or privileges previously enjoyed.

WE WILL within 14 days of the date of the Board's Order, offer Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominguez, and Oscar Cross employment in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions.

WE WILL make Lee Murphy, Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominguez, and Oscar Cross whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, expunge from our files any and all references to the layoff and the refusal to hire and consider for hire, the individuals named above and WE WILL within 3 days thereafter, notify them in writing that this has been done

and that the layoff, the refusal to hire, or consider for hire will not be used against them in any way.

CORPORATE INTERIORS, INC.

Naomi Stuart, Esq., for the General Counsel.

Stephen S. Schuster, Esq., for the Respondent.

Mike Stapp, Esq., for Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. The original charge in Case 17-CA-20750 was filed on July 11, 2000,¹ by Carpenters District Council of Kansas City & Vicinity affiliated with United Brotherhood of Carpenters and Joiners of America (the Union). An amended charge was filed thereafter by the Union on October 4. A complaint issued on October 4, 2000, alleging that Corporate Interiors, Inc. (Respondent), violated Section 8(a)(1) and (3) of the Act in a number of respects. The complaint alleged Respondent's failure to consider for hire and the failure to hire Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, and Dave Simmons in violation of Section 8(a)(3) of the Act. The complaint further alleged that Respondent laid off employee Lee Murphy and terminated the workday early for Kevin Sachuvich in violation of Section 8(a)(3). The complaint also included 21 allegations of independent 8(a)(1) violations.

The original charge in Case 17-CA-20979 was filed by the Union on December 11, 2000, and an amended charge was filed thereafter on February 23, 2000. An Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on February 26, 2001. The consolidated complaint alleged that Respondent further violated the Act by unlawfully refusing to consider for hire and for refusing to hire applicants Chris Williams, Ronald Pfister, Angel Dominguez, and Oscar Cross. The consolidated complaint also alleged that Respondent terminated the employment of Richard Shade in violation of Section 8(a)(3).² The consolidated complaint also includes the allegation that Respondent changed its hiring procedure in violation of 8(a)(3) and four additional independent allegations of Section 8(a)(1).

A hearing on these matters was conducted before me in Overland Park, Kansas, on July 17, 18, 19, and 20, 2001. Thereafter, the General Counsel, Respondent, and the Charging Party filed briefs. Counsel for Respondent and counsel for the Charging Party submitted a posthearing motion to reopen to record for the submission of Respondent's Exhibit 45. Inasmuch as this late-filed exhibit was discussed at trial and there being no objection by the General Counsel, Respondent's Exhibit 45 is received as a part of the record. Based on all the

¹ All dates are in 2000 unless otherwise stated.

² The 8(a)(3) allegation involving Richard Shade was withdrawn at hearing.

evidence of record, including my observations of the demeanor of the witnesses, I make the following³

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Olathe, Kansas, is engaged in the construction industry and the commercial installation of metal studs and drywall. During the 12-month period ending May 31, 2000, Respondent purchased and received at Respondent's facility goods valued in excess of \$50,000 directly from points outside the State of Kansas. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since 1992, Respondent has been engaged in the construction industry as a subcontractor and contractor specializing in the performance of metal stud and drywall work, and to a lesser extent, acoustical ceilings in commercial buildings. Corporate Interiors is located in Olathe, Kansas, a suburb of Kansas City, and performs most of its work in the metropolitan area. At the time of the hearing in July 2001, Respondent employed approximately 25 to 30 employees. Owners Roger and Sharon Klima and their job superintendent, Brent Mumau, direct day-to-day management of the operation. Respondent's work primarily involves erecting metal stud walls, screwing sheetrock onto the metal stud walls, and then taping and preparing the walls to be painted by another contractor. Klima generally classifies his employees as "rockers" and "tapers." Rockers install metal studs and sheetrock, which is also called drywall. Tapers tape the seams in the sheetrock. Respondent also employs non-skilled employees as "apprentices" to assist and to train with the more skilled employees. Respondent's records contain a list of six distinct job classifications: estimator, rocker, taper, metal stud framer, carpenter, and laborer. Klima testified that a carpenter might specialize in a variety of areas. When he had worked as a journeyman carpenter, his expertise had been primarily in metal studs and drywall.

This case involves Respondent's hiring and employment practices in response to the Union's efforts to secure employment for its members and organizers in order to "salt" Respondent's work force. Salting has become a practice of many unions and it involves members or organizers of a local union applying for work at nonunion employers engaged in the construction and electrical contracting industry in order to organize the employer's employees. In its 1995 decision, the Supreme Court upheld the Board's decision that paid union organizers are employees within the meaning of Section 2(3) of the Act. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

³ To the extent that I do not reference certain facts or alleged facts urged by any party in their brief, it is because I was not persuaded by the underlying testimony or because I viewed such facts as irrelevant or merely cumulative.

B. The initiation of the application process

On May 1, 2000, Dallas Darrow, director of organizing for the Carpenters District Council, noted an employment ad for metal studs and drywall employees in the local Kansas City newspaper. The ad did not name Respondent but listed Respondent's phone number. The ad read: "Construction-Lead person for exterior & inter. Metal studs & drywall. Great opportunities." When Darrow called the phone number listed in the ad, he spoke with a man who answered the phone "Corporate Interiors" and confirmed to Darrow that Respondent was seeking employees with metal stud and drywall experience. Darrow told the man he was looking for work and he had about 3 years of metal stud and drywall experience. The man gave Darrow Respondent's address and told him to come by Respondent's office any time the next day to interview for a job.

On May 3, 2000, union organizer Mike Crawford telephoned the same telephone number listed in the newspaper ad. Crawford spoke with Roger Klima and identified himself as "Ron Wilson." Crawford told Klima he was interested in a job performing sheetrock and metal stud framing and confirmed he had about 5 years experience in performing such work. Klima asked Crawford if he also had any experience in installing acoustical ceilings. Crawford confirmed he did. Klima asked Crawford if he would accept \$18 an hour and Crawford agreed. Klima told Crawford to bring his hand tools and to be at Respondent's office the next day at 7:30 a.m. Klima also identified the specific jobsite where his subcontractor was behind on the installation of acoustical ceilings.

1. The May 4, 2000 application for work by union organizers

Crawford did not go to Respondent's office on May 4, as discussed with Klima. Instead, Crawford, Darrow, and six other union organizers, including Tom Garrison, Joe Hudson, Pat Masten, Gerald Shropshire, Dave Simmons, and Keith Winn, went as a group to Respondent's Olathe office to apply for work. The eight union agents arrived at approximately 9 a.m. and parked their vehicles in the cul-de-sac where Respondent's office is located and walked as a group to Respondent's office. The group of organizers initially went to the wrong office in the same building as Respondent. After getting directions to Corporate Interiors' office, the organizers began walking up the driveway toward Roger Klima and two of his employees, who were standing in Respondent's driveway. The conversation between the union organizers and Klima was tape recorded, transcribed, and received into evidence as General Counsel's Exhibits 3-a and 3-b. Holding a cell phone in his hand, Klima spoke first. The conversation began as follows:

Roger: You guys, you guys can leave.
 Pat: How ya doin?
 Roger: The police are on their way.
 Pat: Oh. We're looking for Corporate Interior.
 Roger: Okay. (on phone) Yes. I'm at, uh, 2007 dash B, Prairie Circle. Yes. That's, that's Olathe, Kansas. Okay. (pause) You guys, you guys can leave.
 Pat: We're, we're, uh, calling about employment, for Corporate Interior.

Roger: (on phone) Uh, yes, I need, uh, the police out here at, uh, 2007 dash B, Prairie Circle. Yes, Uh, I got, uh, union business agents. Well, just, just have em come out. Yes. Yes. Uh, yes they are I've asked them to leave and they won't leave. This is my business. Corporate Interiors. My name is Roger Klima. Okay, thanks.

Joe Hudson testified that Klima recognized the group as union agents because he had previously met some of them and because some organizers wore clothing with the union logo. The transcript reflects that business agent Masten told Klima they were looking for sheetrock jobs and they had heard he was hiring. Klima responded, "you think I'm gonna buy that shit?" Klima asked Masten his name and told him that he knew that the organizers were not there to "get hired." Masten again repeated that they were there to seek employment with Respondent, and Masten asked if they could fill out job applications. Klima agreed to give the union agents job applications to fill out, but asserted that he was not hiring anymore. Klima also told the union agents they could take the applications home "and fill em out and bring em back." Masten stated "okay, however you're doing with everybody else." Klima responded, "I'm going to tell you something, I know this fucking game . . . and I'm not gonna play it. So cut the shit. I was a union carpenter for seventeen years. So. You know here's your applications. We'll play the games, fill'em out and bring it back. Okay?" Masten protested that it was not a game, stating "we're here to go to work." Klima responded, "Why are you fucking with me?" Masten repeated that they wanted to go to work for Respondent. Klima asked the organizers why they wanted to work for Respondent and organizer Hudson replied, "cause we'd like to organize your company." Masten told Klima "we're here, we're ready to go, just tell us what you want us to do." Klima responded: "I'll tell you what, man you go down that fuckin' road right over there and take a left and there, there's some water down there and you guys can jump in it, how's that?"

After the arrival of the police and after giving the eight union agents job applications, Klima stated, "There's your applications, now, this is my property and I want you guys to leave and you can bring it back. OK?" Masten asked, "is that the way you do it with everyone that applies?" Klima responded, "that's right." Klima instructed the union organizers to call his office for an appointment after they had filled out the applications. Klima also stated, ". . . but that's not what this is about. This is about the union trying to cause trouble with me." Masten told Klima that it was not true that they were trying to cause trouble, and said, "we'll be call'n [sic] ya."

The union organizers then returned to the union hall to fill out their applications. After filling out his application, union organizer Keith Winn called Respondent's office. Speaking with Sharon Klima, Winn told her he wanted to set up an appointment to come in and turn in his application. Sharon Klima asked him if he was with the group of people who applied earlier and he responded that he was. Klima responded, "I cannot wait to meet you." Sharon Klima then asked Winn for his name and said that she would try to call Roger Klima on the phone. After a pause, she came back on the line and said she did not

know if Klima would be back that day. Winn said he would call back.

Around 11:15 a.m., union organizer Gerald Schropshire called Respondent's office and spoke with Sharon Klima. Schropshire placed the call on a speakerphone for the other union agents in the office to hear and he tape-recorded his conversation. Schropshire told Sharon Klima he had been to Respondent's office earlier that morning and he had now completed his job application. Klima asked if he was out of work or just trying to make trouble. Schropshire assured her that he would like to go to work for Respondent. Klima then asked, "are you looking to reorganize somebody's non-union business?" Schropshire told Klima he would like to go to work for Respondent with the intent to organize the company. Schropshire repeated that he wanted to come to work for Respondent, and stated, "I'm gonna organize his company and make him union." Sharon Klima responded, "But you know what? We don't wanna be a union company." Sharon Klima repeated that Schropshire was not really out of work, that he just wanted to start trouble. Sharon Klima told him Kansas was a right-to-work State, and Respondent chose to be nonunion, "You're trying to reorganize my business which I don't really care to have reorganized." She added, "I don't wanna hire somebody that's gonna come in and try and reorganize my business." During this conversation, Klima stated, "the bottom line is that we do not want to be a union company," and "I can tell you right now we . . . we are not going to be a union company. No matter what you do or you say." The conversation ended with Sharon Klima stating she would have Roger Klima call Schropshire.

At approximately 1:30 p.m. on May 4, Mike Crawford called Corporate Interiors and spoke with their estimator, Conan Bear. Crawford told Bear who he was and he explained that he wanted to return his application and have an interview. Bear told him that Sharon Klima wasn't taking any more telephone calls and Roger Klima was not available. Crawford left a number where Klima could reach him and set up an interview. Klima did not return Crawford's call that afternoon.

Later in the afternoon of May 4, at or about 3 p.m., Darrow, Winn, Crawford, and Hudson returned to Corporate Interiors' office with their completed applications. When the four applicants approached the Corporate Interiors' door, they found a document posted in the window. The document, which had not been posted during their earlier visit to the office, was entitled "Merit Shop Hiring Policies." The Merit Shop Hiring Policies notice was a printed form and provided, inter alia, that Respondent did not accept group applications or photocopied forms; stating "we base our hiring decisions on a variety of factors, including skills and ability to perform the job, prior employment with us, employment references as to character and willingness to work, willingness to accept the offered salary, and personal interviews," and "full-time employees are expected to work only for us and must state that they will not be employed by any other employer while they work for us." Another section of the notice stated "Applications remain on file for _____." The amount of time was left blank. Union agent Hudson photographed the "merit shop notice."

On arriving at the office, the union agents found the door to Respondent's office was locked. They knocked on the door, waited for several minutes, and then knocked again. Sharon Klima eventually came to the door, accepted the completed job applications from Crawford, Darrow, Hudson, and Winn and told them she would file the applications for them.

2. Application attempts on May 5

On the morning of May 5, union organizer Tom Garrison filled out his application and called the offices of Corporate Interiors. Garrison testified he spoke with a woman who told him she would have Roger Klima return his call. Later that afternoon, Garrison called again and spoke to the same woman, who said, "I told you I would have Roger call you back." Respondent did not return the call, and on May 8 and May 9, Garrison called Respondent and again was told that Roger was not available. Garrison testified that he did not submit his written job application to Respondent because, "it's obvious that it was not going to happen." Later in June, Garrison saw Klima on a jobsite and asked Klima if he were going to hire him. Klima responded, "not any time soon."

Masten also called Respondent's office on May 5, and spoke with Sharon Klima. Masten told her he wanted to make an appointment to return his completed job application. Sharon Klima said that Roger Klima was not present and suggested Masten call back. Masten left his phone number, however, his call was never returned. Masten testified that he called Respondent's office on four or five additional occasions, and was told each time that Klima was not available.

David Wilson testified that he called Respondent's office on May 5, and spoke with Klima. Wilson told Klima he was looking for a job. After questioning Wilson about his past work experience, Klima noted that some of Wilson's past employers were union companies. Wilson acknowledged he was a union member. Klima then asked Wilson if he were a union organizer. Wilson told him that he was not. Klima then gave Wilson instructions on the location of Respondent's office, and asked him to come in and fill out a job application on Monday, May 8. Klima mentioned that Respondent had "quite a bit of work, so it does not matter if you are union or non-union, if you want to work and do a good job." Wilson never submitted his application to Respondent.

Later in the day on May 5, Schropshire went to Respondent's office to leave his completed written job application. Klima came out of his office to interview Schropshire and spoke with him for about 10 minutes. During the interview Klima accused Schropshire and his "union buddies" of breaking into Corporate Interior's office the previous night. Schropshire assured Klima that neither he nor any of the union people had anything to do with the break-in. Schropshire also told Klima that he was there to work. Schropshire testified that although Klima talked with him about his prior work experience, he did not administer any test or quiz. Schropshire told Klima he had 15 years of experience as a carpenter and several years of experience performing metal stud and drywall work.

3. Additional contacts by union organizers

General Counsel presented witnesses in support of additional contacts between the union organizers and Respondent. Mike

Crawford called Respondent's office on July 18, and spoke with Klima. Crawford said he was calling about his job application, and asked Klima if he were still reviewing the job applications submitted by the union organizers on May 4. Crawford testified that he told Klima about his prior work experience, including the fact that he had 5 years experience performing sheetrock and metal stud installation work. Klima told Crawford that he would review the applications and get back to him. Crawford denies that Klima administered any kind of test or series of test questions to him. Crawford testified he also made a call to Klima on August 11 to inquire about the union agents' job applications. Although Klima talked about the poor quality of some of his current employees, he made no job offer to Crawford.

Joe Hudson telephoned Klima on July 24. In the tape-recorded conversation, Hudson referred to the job application he submitted on May 4. Hudson asked Klima if he had any plans to hire employees and told Klima he would still like to work for Respondent. Hudson told Klima about his prior experience performing metal stud and drywall and told Klima to call him when he was ready to hire more employees. Klima reiterated his belief that Hudson did not want to work for him but only wanted to organize his company. Hudson denied Klima's having administered a skills test to him at any time during the conversation.

Crawford testified that Klima telephoned him on December 12, and asked him if he were working. Crawford told Klima he was not working and he was interested in going to work for Respondent. When Klima asked if Crawford would work for him at \$15 an hour, Crawford told him that he would. Although Klima discussed his production expectations with Crawford, he did not offer him a job. Crawford recalled that Klima told him, he would get back with him. Crawford testified that at no time after December 12, did Klima contact him, offer him employment, or test his job knowledge or skills.

C. Respondent's Version of the Initial Application by Union Organizers

Respondent presented only the testimony of Roger Klima to rebut the testimony of General Counsel's witnesses. Klima testified that since he first started the company, he has always given a verbal test to every job applicant. He asserts that he neither tells the individual that he is administering the test nor does he give them a copy of the results. He places the written results of the test in the applicant's personnel folder. Based on the applicant's response to the questions, he determines the appropriate hourly wage rate to offer the applicant. Klima testified that after receiving the employment applications on May 4, he separately interviewed Winn, Hudson, Darrow, and Crawford by telephone. Klima maintains that during these telephone interviews he verbally gave the applicants a test he had developed to measure their skills and knowledge regarding metal studs and acoustical ceiling work. He maintains that while he did not tell the applicants that he was administering a test, he recorded their answers on a written form. Respondent argues that based on the answers provided to Klima, he made job offers with an hourly rate commensurate with the applicant's skill and knowledge. Respondent contends that all four men refused

the offers stating that they would not work for less than \$30.78 an hour, the desired salary amount indicated on their job applications.⁴ Klima's testimony varies with respect to when these telephone interviews were administered. Initially his attorney asked him if had seen or heard from the applicants later in the day on May 4. He responded, "Not that I can recall." His attorney then asked again:

Q: Did you yourself, Mr. Klima, have any personal contact or conversation with any of the applicants that day? I mean other than the morning conversation.

A: I don't remember.

In further direct examination, he testified that he had spoken with Darrow and Hudson on May 4. During cross-examination, Klima testified that he was sure that he had spoken with Darrow sometime after May 4. On direct examination, Klima testified that he had spoken with Joe Hudson, administered the test, and offered him a job for \$15 an hour on May 4. Later in cross-examination by General Counsel, Klima testified that he did not give a test to Hudson on May 4 and he did not even have a telephone conversation with Hudson on May 4. In still later cross-examination by Charging Party's counsel, Klima testified that he was sure that he had spoken with Hudson on May 4 and had administered the test as well. Klima could not recall the dates when he had spoken with Winn and Crawford to administer the tests and to make the job offers. He admitted, however, that while the interviews had occurred after May 4, he had backdated the tests to May 4.

D. Lee Murphy's Employment with Respondent

Lee Murphy is a journeyman carpenter and a member of Local 61 of the Union. On May 10, 2000, union organizer Mike Crawford asked Murphy to apply for sheetrock and metal stud framing work with Respondent. On May 11, Murphy arrived at Respondent's office at approximately 7 a.m. Murphy was given an application, which he completed and submitted to Roger Klima. Klima interviewed Murphy along with another applicant; Art Janke. Murphy testified that Klima mentioned that both Janke and Murphy had union backgrounds and he asked why they were looking for work. Murphy responded that he was answering the employment ad and he had not been able to find work with a union employer. Klima asked Murphy and Janke if they were union members and they responded they were. Klima told Murphy and Janke that approximately a week earlier some other union workers had applied for work. Klima stated he had told the organizers to "get the fuck out of his office" and he "didn't want nothing to do with the union." Both Murphy and Janke assured Klima they were not organizers. At the end of the interview, Klima told both Janke and Murphy he would hire them, and he told them not to tell the Union that Respondent had hired them. Murphy testified that Klima did not give them any kind of employment test or go through any series of questions to test their jobs skills. Klima sent both men

to work immediately after hiring them on the morning of May 11.

1. May 11, threat

Murphy was initially assigned to the Clay County Bank worksite. Later in the morning, Murphy was called back to the office for assignment to another jobsite. Murphy testified that while he was in the office, he overheard a radio call between Brent Mumau and Klima. Mumau called Klima to inform him that union organizer Mike Crawford was at Respondent's Metcalf jobsite. Murphy testified that Klima directed Mumau to tell Crawford to "get the fuck off his job or he was going to blow his head off." Crawford testified he was at the Metcalf jobsite and heard Klima's remark over the radio. When Crawford asked Mumau what Klima had said, Mumau responded, "you don't want to know what he said."

2. May 12 threat of arrest

Mike Crawford testified that the Union began their picketing of Respondent's jobsites on May 12, 2000. Murphy was working at Respondent's jobsite located at College and Roe on May 12. At approximately 9:30 a.m., Crawford came onto the jobsite and stayed for 5 to 10 minutes. Murphy recalled that Respondent's tape foreman called Klima at approximately 11 a.m. and informed Klima that Crawford had been on the jobsite that morning. Murphy overheard Klima tell the foreman that if Crawford came on the jobsite again, Klima wanted him arrested for trespassing.

3. May 18 solicitation of Murphy

Murphy was assigned to work at the Metcalf jobsite on Thursday, May 18. By the time Murphy arrived at the jobsite, the union picket was already established at the perimeter of the jobsite. At approximately 9:30 a.m., union organizers Crawford and Hudson came to the job and talked with the pickets as well as some of Respondent's employees. After Crawford left, Mumau approached Murphy and told Murphy to tell him if Crawford came back to the jobsite again so that Mumau could have Crawford arrested for trespassing.

4. May 19 interrogation

The union picket was again present at the Metcalf jobsite on Friday, May 19. Crawford and Hudson came to the jobsite around 11 a.m. and spoke with several employees. After the two union agents left the jobsite, Mumau approached Murphy and asked, "are you sure you are not an union organizer?" Even though Murphy denied that he was, Mumau asked him a second time. Mumau told Murphy that he was to let Mumau know when Crawford and other union organizers were on the jobsite. He also told Murphy that he was to keep the union agents on the jobsite until the police could come and arrest them. Mumau also volunteered that Respondent had a plan to sabotage the picket area by placing honey in that area to attract bees.

5. May 22nd threat

Murphy was working at the Metcalf jobsite on Monday, May 22. Again there was a union picket on the jobsite throughout the day. Murphy testified that Mumau told him that if Crawford came on the jobsite that day, Mumau was going to have

⁴ Darrow, Winn, Hudson, and Schropshire all testified they had no telephone interview with Klima in which he had given them a skills test or offered them employment.

him arrested for trespassing. Mumau instructed Murphy to notify him if Crawford or other union agents returned to the jobsite in order that Mumau could have them arrested.

6. Murphy's layoff

When the Union picketed Respondent's Metcalf jobsite on May 23, 2000, the pickets stood at the curb close to the street. Union agents Crawford, Darrow, Hudson, Garrison, and Winn went to the jobsite to observe the picketing. They were also present to offer support to Murphy, who planned to tell Respondent that morning that he was a union "salt." Murphy arrived at the jobsite around 7:30 a.m. Murphy's job that day was to perform welding work on the roof of the building under construction at that jobsite. Mumau was also working on the roof as well. Murphy testified that shortly after work began, he told Mumau that he was a "salt" and that he planned to help organize Respondent's employees.⁵ Mumau responded, "I figured it was you that was doing all this." When Murphy asked Mumau what he wanted him to do, Mumau told him to keep working. Mumau went on to explain that there was a lot of work to do and added, "I can't fire you."

When Klima arrived at the jobsite around 9:30 a.m., he was carrying a camcorder. Murphy recalled that Klima came on the roof and walked toward him with the camcorder. Klima told Murphy "I thought you weren't an organizer." Murphy explained to Klima that he was not an organizer, he was a "salt person" and a union member. Murphy testified that the union agents were standing on the ground with the pickets about 25 yards from the roof where Murphy and Klima were talking. At one point during the time that Klima was on the roof, he walked over to the edge of the roof and spoke with the union agents below. General Counsel submitted into evidence a statement signed by union agents Darrow, Winn, Hudson, and Crawford. In the statement, the agents record Klima's saying that they would not like it when he snapped. Hudson testified that he responded to Klima "it looks like you are already upset."

After Klima's initial conversation with Murphy and the union agents, he went over to the section of the roof where Mumau was working. Murphy testified that Klima returned to him after 5 or 10 minutes. Klima explained that since Murphy's welder was shorting out,⁶ Klima would need to take the welder out of service. Klima then added, "I have nothing more for you to do." Murphy asked if there was any other work that he could do on that jobsite or on another jobsite. Klima told him that he didn't have any more work for him and suggested Murphy go home and then call in the next morning.

As requested, Murphy contacted Klima on the morning of May 24 to inquire about other work. Klima told him that there was no work and that he should call back the next day. When Murphy called Klima again on May 25, Klima told him that he had done a good job and that he was a good welder. He added, however, that even though the welder had been repaired, there was no work for him. He was directed to come in on May 26 to

pick up his paycheck. Klima told him that there might be some work available after the holidays, but there was no guarantee.

When Murphy went in to see Klima on May 26, he recorded his conversation. During the conversation, Klima referred back to his initial employment interview on May 11. Klima reminded him that he had asked Murphy at that time if he were a union organizer or affiliated with anyone and Murphy had told him no. Murphy explained that he had answered Klima's question truthfully on May 11 because he was not an organizer. Klima replied, "I know, but you work with, em, I mean." Klima added, "I know exactly what you are doing and I think it sucks." Murphy stated, "... I have nothin' against ya, I just wish you'd sign up in the union, that's all I'm asking for. ...". Murphy testified that he continued to call Respondent during the following week to find out if there was work for him. He maintained that Respondent never returned his calls.

Union agent Winn testified that early on the morning of May 24, he was present at the Metcalf jobsite. He observed the return of the welder to the jobsite and observed another employee performing welding work using this same welder. Winn testified that he also observed welding work performed on this same jobsite on May 25.

7. Respondent's position on Murphy's layoff

Respondent submits that Murphy was laid off for legitimate, business reasons and was subsequently asked to return to work. Respondent points out that Murphy concedes the welder was malfunctioning and he had complained about the welder to Mumau. Respondent submitted a copy of the invoice for the repair of the welder. The invoice is dated May 23 and reflects Respondent was charged \$37.50 in labor cost for "troubleshooting." Klima testified Respondent only had one welder on May and that was the one used on the Metcalf site. Klima testified he called Murphy approximately a week later to let him know that Respondent needed him back. Klima contends that he spoke with Murphy's wife and left a message for Murphy to call. When Murphy had not called back in 2 days, Klima called again. At that time, Murphy told him that he had already taken another job.

In its brief, Respondent contends Murphy not only lied under oath at the hearing about when he began working for another company, but he lied to Klima on May 26. When Murphy returned to Respondent's office on May 26 to return his tools, he recorded his conversation with Klima. The transcript of the conversation was received into evidence as General Counsel's Exhibit 16-b. Respondent's counsel maintains Klima asked Murphy whether he would be willing to return to Corporate Interiors once welding resumed. Counsel further asserts that Murphy falsely stated that he was not presently working and that he would consider coming back. The pertinent part of the transcript reflects the following conversation:

| | |
|--------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Roger: | They won't put ya on huh? |
| Lee: | Huh? |
| Roger: | They didn't have any work for ya? |
| Lee: | Well, I'm waiting for this, uh, company that I wanna go back to work for they're supposed to start next week. I've worked for them awhile. And I like that |

⁵ Although Mumau did not testify at the hearing, Klima admitted Mumau told him on the morning of the May 23, that Murphy had told him that he was a salt.

⁶ Murphy confirmed that the welder had been shorting out that morning.

type work. I'm a trim type of guy now. I've done metal studs like I said probably for close to ten more than that and I've just kinda faded out of that.

Roger: Well, I understand.

Lee: I mean nothin', I like doin't it. Nothing against it. But I don't know. Trim has become my fancy. I don't know. I'll give you a buzz next week to see if ya got anything started. If I don't start back up. You can put me back to work well I'll work.

Murphy was asked on cross-examination when he went back to work for Winn-Senter after he worked for Corporate Interiors. Murphy replied that he could not recall the exact date but confirmed that it may have been a little more or a little less than a week. Respondent asserts that Murphy's pay records from Winn-Senter reflect that he worked on May 24, the day after his layoff from Respondent. Respondent submits that Murphy cannot be credited in his testimony that Klima never called him back to work because he lied about when he began working for another company.

E. Discrimination Alleged Toward Kevin Sackuvich.

Because Kevin Sackuvich was deceased at the time of the trial, his affidavit was introduced into evidence as General Counsel's Exhibit. 26-a. When Sackuvich was hired on July 14, Klima told him that he was videotaping the interview. Klima explained that he was videotaping the interview because of the Union's charges involving the layoff of a welder. When Sackuvich told him that he felt uncomfortable because of the camera, Klima replied that he did too, "but he had to protect his ass." Klima described the Union as "a bunch of fucking losers" and "a bunch of dumb asses."

On Thursday, July 20, fellow employee Art Janke asked Sackuvich if he were a "salt" for the union. Sackuvich walked away without answering. Later that same day, Mumau asked Sackuvich if he were a union salt. Sackuvich denied that he was, told Mumau that he was crazy, and walked off. On July 24, Sackuvich noticed that two new employees began working at the jobsite. At approximately 10:20 a.m., Mumau came up to Sackuvich and told him that he thought that he was a "salty dog." In his affidavit Sackuvich recalls, "I looked at him and he said, a union salt, just go ahead and go home." Sackuvich maintained that he went home although his normal quitting time was 4 p.m.

Respondent submits that Sackuvich voluntarily chose to leave early on July 24. Klima testified that when it started raining on July 24, all employees were given the option of going to another jobsite or going home early. Respondent asserts that Sackuvich and another employee, Steve Thomas, voluntarily chose to go home early. Respondent points out that General Counsel does not dispute Sackuvich returned to work the next day.

F. Alleged Independent 8 (a)(1) Violations

1. May interference with picketing

David Castleberry testified that he and David Oldham first began picketing Respondent's office in Olathe, Kansas, in May 2000. The pickets arrived at the office around 7 a.m. and pick-

eted with area standards picket signs. Castleberry testified the pickets stood on the easement by the street curbing on the west side of the double lane entrance drive to Respondent's office. The pickets walked back and forth across the driveway entrance to Respondent's office. The easement immediately adjacent to the street is covered with grass and there is no sidewalk in front of Respondent's office. During their first morning of picketing in May, Klima approached the pickets with a video camera in hand. Klima introduced himself and asked the pickets to identify themselves. He then told them that they were trespassing on private property and threatened to call the police if they did not leave. Klima continued by telling them they had no right to be there and they were infringing on his civil rights. When Klima told them again to leave or he would call the police, Castleberry gave him union representative Tom Garrison's business card. Castleberry suggested that Klima call Garrison if he had any questions. When Castleberry and Oldham continued to picket, Klima went back inside his office. Approximately 20 minutes later, the police arrived and proceeded to Klima's office. While the pickets could not hear what the police said, they were able to hear Klima who was talking in a loud voice. Klima told the police that the pickets were infringing on his rights and that he wanted the pickets arrested for trespassing. The police then told the pickets there was a 6-foot easement from the curb and that they could picket within the 6-foot easement. The police also suggested the pickets not cross the drive and not block traffic on the drive.

On May 23, Castleberry and Oldham resumed picketing at Respondent's office at approximately 12:30 p.m. Castleberry testified he was standing in the driveway near the entrance to Respondent's office picketing. He recalled that Klima abruptly pulled his vehicle into the drive and almost struck him. He testified that he had to jump out of the way of Klima's vehicle and Klima proceeded up the driveway. Castleberry recalled Klima had applied his brakes just before making contact with him. Castleberry contended that while Klima said nothing to him, he had "kind of snickered and smiled at me."

At approximately 2:30 p.m. that same afternoon, two policemen arrived in separate cars at Respondent's facility. Klima met the police in the driveway. Castleberry recalled Klima's screaming and yelling at the police. Klima screamed that the police needed to do something about the pickets and to get them "out of there." Klima also told the police that if they did not remove the pickets, he "would have to do something about it and he would be the one going to jail." The police tried to calm Klima and explained the pickets had a right to be there and pointed out they were in the easement area. Klima showed the police a videotape of the pickets, claiming the pickets had walked outside the easement line when they crossed back and forth across the driveway entrance. After watching the video, the police told Klima they could not determine whether the pickets had been outside the easement. The police told the pickets to stay on the grass easement and to stay off the driveway entrance. Castleberry's handwritten note prepared contemporaneous with the event was received as General Counsel's Exhibit 15.

On May 26, Murphy returned to Respondent's office to collect his check as instructed by Klima. Several of the union

representatives were present with the pickets at this time. Mike Crawford testified that as he was standing in the street taking photographs of the office, Klima was driving toward the office. Crawford testified that Klima swerved toward him and tried to hit him. Pickets Castleberry and Oldham as well as union agents Crawford, Hudson, and Winn signed a handwritten statement verifying Klima's alleged attempt to hit Crawford. Crawford maintained that Klima had come within 16 inches of striking him.

2. June unspecified threat

Tom Garrison testified that he was at the Metcalf jobsite in June during the time of the Union's picketing. Garrison recalled Klima drove up, got out of his car, and came over to Garrison and the picket. Garrison testified Klima said, "one of these days I'm going to snap, and when I do, I don't know what is going to happen."

3. June 5, interference with picketing

On June 5, Castleberry and Oldham were again picketing at the Respondent's office. At this time, they chose to picket while sitting in lawn chairs on the grass easement next to the curb. Castleberry maintained that he was so close to the curb that his feet were on the curb itself. Castleberry estimated that at mid-morning, Klima arrived and videotaped the pickets as he drove past them. After parking his vehicle, he yelled back to the pickets "I wouldn't sit there if I was you." Klima then walked over to the front of the office building and turned on the water spigot. Garden hoses and moveable sprinklers were attached to the water spigot. The sprinklers were positioned to water the easement area west of the driveway where the pickets were located as well as the easement area to the east side of the driveway. Castleberry recalled the water also extended out to most of the double lane driveway entrance, leaving only a small area in the center of the drive untouched by the sprinkler. Because of the sprinklers, the pickets folded up their lawn chairs and continued to picket by standing in the dry area of the driveway. When they did so, Klima came out and videotaped their standing in the middle of the driveway entrance. Within an hour of the sprinklers being turned on, the police arrived at Respondent's office. Castleberry testified that as the police approached the office, Klima turned off the sprinklers. Klima showed the policemen the videotape of the pickets standing in the middle of the driveway and exclaimed that the pickets did not have any right to be there and he wanted the pickets "out of there."

The police officers instructed the pickets to stand in the grass easement area and the police explained they had called their supervisor for directions. While the police waited for their supervisor in their squad cars, the pickets waited on the easement. Castleberry recalled that while they were waiting for the arrival of the police supervisor, several of Respondent's employees arrived at the office. Castleberry heard Klima tell the employees "I'll show you how to take care of these boys" and then he again turned on the sprinklers. The third police officer arrived at the same time as union agent Tom Garrison. When the three police officers walked up the drive to Respondent's office, Klima turned off the sprinklers. The police confirmed the pick-

ets could continue to picket on the 6-foot easement from the curb.

4. June interrogation of James Hyde

On June 19, James Hide called Respondent's office and spoke with Klima. At the union's direction, Hide taped the conversation and the tape and transcript were introduced as General Counsel's Exhibits 23 (a) and (b). After discussing Hide's experience, Klima asked him if he was in the union. Hide told Klima that he was not union. Klima gave Hide directions to the office and told him to report the following morning at 7:30 a.m.

When Hide reported to the office the next day, he met with Klima. As he had done the previous day, Hide tape-recorded the conversation on June 20. Klima told Hide he was tape recording their meeting. Klima explained that he records the interviews because he thinks it is the safest thing for him to do. Klima stated that union organizers wanted Klima to hire them and "then try to organize all my employees and turn them against me." Klima continued to explain that he had previously hired an employee and had asked him "are you union." Klima explained to Hide the only reason that he asks people if they are union is to find out if they are familiar with anyone he knew when he was in the union.⁷ Klima's tape of Hide's interview was introduced into evidence as Charging Party's Exhibit 9. Klima reviewed the tape during cross-examination by Charging Party counsel. Klima admitted he turned off the video camera before the completion of Hide's application interview on June 20. He further admitted that after he turned off the camera he later asked Hide "are you in an organization or an organizer?" Although Klima asserted he gave Hide the 20-question skills quiz on June 20, he admits that the test is not on his video recording of the interview. The test is not included on Hide's audio recording of the interview.

Hide began working for Respondent on June 20. He testified that he began performing welding work on July 7, even though he was not a certified welder.

5. July 14, arrest of pickets

David May testified that he and Gerald Newsom were picketing at Respondent's office on July 14. The pickets sat in lawn chairs on the easement to the east of the entrance driveway to Respondent's office and approximately 2 to 3 feet from the curb. Newsom left shortly before noon. Just after Newsom left, two policemen arrived in separate cars. When the police arrived, Klima came out of his office and began yelling that the pickets were trespassing on his property and tearing up his property. Klima told the police that although he had asked the pickets to leave, they refused to do so. May told the police that Klima had not only failed to ask him to leave, but had never even spoken to him before. May explained to the police and Klima that if Klima were now asking him to leave, he would gather his things and he would leave. May explained his instructions that if asked to leave, he was not to argue, and he was to call the Tom Garrison, the union agent in charge of

⁷ In his brief, counsel for the Charging Party points out that despite this claim, Klima never asked Hide if he knew any of the people he worked with while he was in the Union.

to call the Tom Garrison, the union agent in charge of the picketing.

During the discussion, one of the officers asked May if the cigarette butts in the yard were his. May denied the butts in the yard were his. He explained that he placed his cigarette butts in a hole in the street by the curb. At the end of the day when he finished picketing, he removed the butts from the hole in the street and placed them in the trash. The policeman told May that Klima wanted him arrested and he was going to be arrested for littering. The police told May that he might also be charged with criminal trespass. Without success, May asserted he had just been sitting on a lawn chair on the easement, he had not harassed anyone, and he was not trespassing, as he did not have any criminal intent. Klima continued to argue to the police that the pickets were destroying his grass and that May should be arrested for criminal trespass. The police then searched May, handcuffed him, and placed in the police car. May was taken to jail and he remained there for about 2-1/2 or 3 hours until Union Agent Garrison posted \$250 in bond for his release.

In a handwritten statement attached to the police report, Klima complains the pickets were smoking and throwing cigarette butts on the yard; the picket signs left holes in the ground; and he had asked the pickets to leave, but they refused. The police report reflects the police recovered 11 cigarette butts from the hole in the street. May testified he observed employees and drivers of delivery trucks throw their cigarette butts from their vehicles as they drove up the driveway to Respondent's entrance.

6. July 17, 18, 19 interference with picketing

July 17 was the first day Ronald Pfister picketed for the Union at Respondent's office. Union agent Garrison instructed Pfister and fellow picket Roy Edwards to walk picket on the easement adjacent to the street. The police then arrived and told the pickets that they were to walk on the easement, but not on the curb, and that they were not to step on the driveway entrance to Respondent's office. While the pickets were picketing on the easement in front of the office, Klima came out and announced he was going to water the grass. He did not do so however.

Pfister testified that two police officers came to the picketing site again on July 18. The police told the two pickets that if there were problems with the picketing, a Kansas resident would be issued a citation for the first violation, and arrested on the second violation, however, a Missouri resident would be arrested on the first violation. Edwards, a Missouri resident, never returned after that week. The following day Pfister picketed again and the police came out again. The police then told the pickets they were permitted to walk across the driveway entrance and were permitted on the curb as well as the street and the island in the middle of the cul-de-sac in front of Respondent's facility. They were cautioned, however, not to impede traffic. Later that same afternoon, Klima approached the pickets taking a break at their cars and accused them of improperly being in the street.

7. July 25, interference with union activities

On July 25, union agents Joe Hudson and Mike Crawford visited Respondent's Metcalf jobsite. They went up on the roof

of the building under construction to talk with Respondent's employees. When they got to the roof, Brent Mumau told them they were not allowed on the project because they did not have permission to be there. Crawford told him they had obtained permission from the general contractor on the project. Mumau then went to the superintendent for the general contractor and told him he did not want Hudson and Crawford on the project. Initially, the general contractor told Crawford and Hudson to leave the project. The superintendent for the general contractor then contacted his superior. Following this telephone contact, Hudson and Crawford were informed they could remain on the project for as long as they wanted. Mumau then told Crawford and Hudson they had to leave the project if they wanted to get down from the roof as he was removing the ladder. The affidavit of Kevin Sachuvich reflects that Mumau commented on this incident to the other employees. Sachuvich reports that Mumau stated, "The only reason the ladders were taken was to get those fucking union guys off the roof."

8. August 11 sprinkler incident

Chris Williams testified that he and two other pickets were picketing at Respondent's office on August 11. While the pickets were picketing in the easement, Klima turned on the sprinklers without any warning. The sprinklers sprayed water on the easement area where the pickets were picketing and also a substantial part of the street in front of Respondent's office. The pickets continued to picket on the easement throughout the hour or so that the sprinklers were on. Ronald Pfister testified that it was common for the sprinklers to be turned on when the pickets were picketing in the easement and recalled that often the sprinklers were left on all day. Williams recalled one day in particular when Klima pointed the garden hose directly on the pickets. Williams directed the other picket to call 911 and Klima did not turn on the water.

F. The application of Williams, Pfister, Cross and Dominquez

Beginning on July 18, the Union changed the language on its picket signs at Respondent's office and jobsites from area standards language to unfair labor practice language. On September 12, the Union picketed Respondent's office with the unfair labor practice picket signs. Located near the area where the Union was picketing was a sign in Respondent's front yard. The sign stated, "Corporate Interiors Inc. is an equal opportunity employer. We offer excellent benefits & competitive wages without any dues or fines. If you are a hard worker who wants to work year round call: 913-764-4806." Williams recalled this sign had been posted in front of Respondent's office since at least early August when he first began picketing. The three pickets on September 12, were Pfister, Oscar Cross, and Angel Dominquez and all three carried the unfair labor practice signs. On this date, the pickets wore shirts with the words "Corporate Interiors, Inc." covered with a circle and a slash, the international "no" sign.

At approximately 1:50 p.m., Union Agent Crawford asked Chris Williams to go in to Respondent's facility, apply for a job, and tape record his conversation. As Crawford directed, Williams picked up an application and then took it back to his car to complete. When he completed the application, he photographed it before returning it to the receptionist in Respon-

dent's office. Williams testified that when he submitted the application, he noticed that he had not listed his complete telephone number and he then added the number to his application before submitting it to the receptionist. Williams testified that he did not include a desired wage rate on the application form. Williams' application offered into evidence by Respondent includes \$30 as the desired wage for Williams.

When Williams left Respondent's facility, he returned the tape recorder to Crawford, who was waiting outside with the other pickets. Crawford then gave the recorder to Pfister and told Pfister, Cross, and Dominquez to go inside and also apply for work. Once inside Respondent's facility, the three pickets spoke with Klima. He told them that although he was laying off employees, he would be happy to give them job applications. Klima also told them that he was recording their conversation. Klima asked the three applicants how many years of experience they had. Pfister told him that he had 6 years metal stud and drywall experience. Dominquez told Klima he had approximately 3 years of experience in metal stud, wood framing, and sheetrock. Cross stated that he had 6 years experience. During the interview, Sharon Klima interrupted Klima and pointed out the tee shirts worn by the three applicants. She told them she thought the tee shirts were "rude" and "bold."

While Pfister, Cross, and Dominquez were in Respondent's office, Crawford and Williams waited outside. After the three pickets left Respondent's office, they joined Crawford and Williams on the easement and returned the tape recorder to Crawford. Shortly after their leaving the office, Klima came out to the curb area. With a can of spray paint, he altered the "equal employment" sign by covering with spray paint the words "If you're a hard worker who wants to work year round call." Crawford proceeded to tape his conversation with Klima. Crawford asked Klima, "You don't want hard workers?" Klima responded, "If you're a hard worker. Call. I guess I need to get that off of there the gist is if your hardly a worker then bring your lawn chair out and sit in the front yard." During the tape-recorded conversation, Klima stated that it was a free world and he should be able to choose whether he was union or nonunion. He told Crawford and the pickets that if they wanted to be union that was fine but he was not bidding any union work. Sharon Klima joined in the conversation and asked Pfister if he were out of work. Pfister answered that he was. Sharon Klima responded, "why are you sit'n out here today? Why aren't you look'n for work. I don't understand that either." Sharon Klima also asked Pfister why he wore the shirt when he applied for work, and added "it occurred to me you are out here everyday, you are not looking for work." She referred to the sign that her husband had just spray painted and explained, "we're defending ourselves. We are advertising for help."

The transcript of the conversation reflects that Crawford asked Klima about his pay scale for employees. Klima told him that the employee's pay depends upon a paper test that he gives the person. The conversation includes the following:

Mike: And then your pay scale you pay your guys twenty-four, twenty-five an hour or close to that?

Roger: Umm, not all of em. Just depends on, you know we give em tests.

Mike: Tests?

Roger: Um, huh.

Mike: Like paper tests?

Roger: Yeah. I give em a little bit of a, a little paper test. Once they're hired. Once I feel like they meet the qualifications and I wanna hire em, then I'll give em a test. A little bit of a verbal test and then I give em, maybe one on the job site real quick. And uh.

In response to Klima's comments about the test, Crawford announced that he would like to do one of Klima's tests and he was sure that one of the pickets would love to try one of the tests as well. Klima then responded by asking for what was a 3/4-inch pin used. Klima followed by asking them what color loads are used for concrete. When Crawford pointed out that it depends on the kind and power of the gun used, Klima clarified to a 1/2-inch gun. Crawford then commented "so, that's your test? You, you test the guys on what kind of screws? Crawford then proceeded to explain what he thought would be a better test for Klima to use. Williams, Cross, and Pfister testified they were never administered the 20-question skills test.

H. Respondent's Position on its failure to hire the September 12 applicants

Respondent asserts that it processed the applications submitted by Williams, Cross, Pfister, and Dominquez. In his brief, Counsel for Respondent submits that Klima interviewed each of these applicants and verbally gave them the test to measure their experience in the specialized work performed by Respondent. Counsel asserts that on the basis of these tests, Klima offered each of them employment and they all rejected the offers of employment.

Klima testified that after the four applicants left his office on September 12, he realized he had not given them the 20-question test. He walked out of his office and stopped the applicants as they were walking toward the street. He testified that he pulled each of them aside and talked with them individually. During the individual conversations, the others were approximately 10 feet away and may not have been able to hear his conversation with the individual applicants. He could not recall whether Crawford was present when he spoke individually with the applicants. Klima maintained that he had the test forms on his clipboard and he administered the test to each of the applicants as he spoke to them outside. Klima confirmed that during the same conversation, in which he administered the test, he also spoke with each of them about what wage rate they would accept. During his testimony, Klima admitted that he did not make a job offer to the applicants on either September 12 or at any time thereafter. He testified that he told them that he would call them if something came up. He admitted he never called them after September 12.

I. Respondent's October 2 employee meeting

1. Changes in hiring policy

Employee James Hide attended Respondent's meeting with employees on October 2, 2000. Unknown to Respondent, Hide tape-recorded the meeting. In its brief, the Union asserts that during the meeting, Klima informed is employees that he was

setting up a new company policy to avoid hiring union organizers. The transcript of the tape-recorded meeting reflects the following dialogue:

Roger: So, you know what I'm say'n is, you know the total situation has been a total nightmare, we, went from our basement. We've been in business like nine years, goin on ten? So, we went from our basement then all of sudden we got in here and it just grew, you know, overnight. And, uh, it's hard for two people to keep track of everything single thing and you know bid jobs, order material, um, you know, everybody, somebody wants a day off here, and this guy doesn't, he, he calls in on the answering machine, um, just all gonna this kind stuff, we don't have enough time to get, a company policy.

Gene: Uh, oh.

Roger: And to get a company policy we're starting on that because now we have to.

Sharon: But can't really right now, because.

Roger: We gotta go to court first because if we put company policy setup then that means that we're discriminating against the union because they're say'n well you're just not following company policy.

During the same meeting, Klima told the employees that the attorney had a company handbook and had told him that if he followed the guidelines "they won't be able to jack with you anymore." Klima added, "So that's what we did." He explained how the sign on the door could be worded to deal with applications. Klima also explained that he was adding language on the applications to show that they were kept on file for 2 weeks. He explained, "Then I can throw them away. Now if I could keep indefinitely. That means that uh, I can't hire a different person if the union guys come in and they've got applications on file that means I probably, I have to hire them first because I got their, I have to keep their applications on file instead of throw'n em in the trash and startn' over again."

2. Respondent's alleged statement not to hire union affiliated employees

General Counsel submits that during the October 2 meeting, Klima told employees that he would not hire union affiliated employees. The passage of the transcript on which General Counsel relies contains the following:

. . . we gotta a lotta work come'n up again so we're gonna be, we're gonna be hire'n again and I don't know I'm going be doin that cause the unions gonna be look'n through the paper and uh, call'n and you know probably get'n some more Richard Brownells I'm sure, but I gotta do what I gotta do to land the jobs and. . .

3. Respondent's alleged statement that it would more strictly enforce its rules

During the meeting Klima discussed safety issues with the employees and voiced his belief that the Union was reporting Respondent's safety violations to OSHA. An employee who was identified as Gene asked if he had to wear the safety harness all of the time and complained that to do so would affect

production. Although Klima initially told him no, Klima interjected that it was the law. Klima then instructed, "No, okay, till they go away." During the meeting, Klima also talked with employees about their attendance and the Union. Klima explained, "You know if, you know if you give, tell one guy hey you didn" call in today that "a mark against you, then, if you don't do it to everyone then but you did it to him and your not doin it to the rest of em your discriminating against em." Klima also explained, "and the company policy also says about um, about the calling in, uh, and also there's like, like you get this little warning that you get this little warning things out uh, we have to do it the union forces us to do that er it's called discrimination."

4. Impression of surveillance

At another point during the meeting Klima asserted, "Their the ones call'n OSHA and when we got the snitch in the company that's tell'n where every job sites at, OSHA's gonna be come'n back and their gonna be look'n for, you know, the wrong clothing, you know." One of the employees asked, "Will they still be picketing the job?." Klima replied, "They haven't been out at your guy's job. You know why? Because two people didn't know about it, Richard Bromwell and Richard Shade."

J. Additional Allegations of Animus

Daryl Love began working for Respondent in 1998 and worked as a lead taper. He testified that in late July or early August, Klima told him that he was tired of the pickets. Klima asked him if he would place horse manure in the areas where the pickets walked in front of Respondent's office. At approximately 5:30 a.m. the next morning, Love placed the horse manure in the grass on the left-hand side of the driveway. Later that morning, Klima called Love on the radio complaining that he had placed the manure in the wrong place and had not put out enough manure. Still later in the day, Klima told Love the police had been out and inquired as to who was responsible for leaving the manure. Klima said that he was told that he had been given 10 days to remove it. Klima had laughed and said that he would remove it on the 10th day. Love recalled that the manure had not been removed until the 10th day.

Klima denied that he told Love to put the manure on the grass. Klima recalled that Love had been very unhappy with the pickets. Klima maintained that Love suggested that he could place horse manure in the area where the grass had turned into mud. Klima testified that he told Love that he did not think that was a good idea and told him not to do it. On cross-examination Klima admits that in an affidavit given to the Board in a related case, he denied knowing who placed the manure.

K. Evidence of disparity in the application process and hiring of other employees

In his brief, counsel for the Union points out that Respondent continued to advertise for employees in the newspaper after the union applicants applied on May 4 and on September 12, up through December 20. The newspaper ads were admitted into evidence as General Counsel's Exhibit 7. The Union also references the evidence that Respondent posted signs at its corpo-

rate offices and at its jobsites in June and September indicating it was seeking qualified employees.

Todd Rainey testified that he called Respondent in June and spoke with Klima. Rainey explained he was a carpenter and was looking for work. He described his past work experience. While Klima took Rainey's telephone number and told him that he would get back with him, Rainey did not submit an application. On November 16, Klima called Rainey's home and left a message for Rainey to call him. Rainey had not contacted Klima since his June inquiry about work. When Rainey returned Klima's call on November 18, Klima told him that he was looking for some good men he could count on and who could lead his crew. Rainey indicated he was still interested. Klima asked him to come in on November 20 to fill out a job application. Rainey reported to Klima's office on November 20 and after completing his application, he started to work that same day.

Respondent stipulated the following employees were hired after May 4: Tim Kline (May 5); Lee Murphy and Art Janke (May 11); Jim Hide (June 19); Lance Ball (June 28); Chris Hanrahan (July 3); Kevin Sachuvich (July 13); Richard Shade (July 17); Oscar Ramirez (July 18); Mike McCuen (July 22); Larry Belcher (August 8); Brandon Botts (August 10, rehired January 18, 2001); Scott Haas (October 5); Mark Chatfield (October 30); Todd Rainey (November 16); Stacy Beck (November 27); Charles Bond (January 21, 2001); and Anthony Easley (May 1, 2001). During his testimony, Klima identified 20 individuals whom he had previously hired who were members of a union or thought to be affiliated with a union.

L. Analysis and conclusions

General Counsel has alleged numerous violations of Section 8(a)(1) in conjunction with Respondent's failure to hire the union organizers, its lay off of Murphy, and its cutting hours for Sachuvich. The consolidated complaint also includes numerous allegations of independent 8 (a)(1) violations. The allegations are grouped by similarity and discussed as follows:

1. Calls to police, threats and attempts to have pickets and union agents arrested

Beginning in May 2000, union agents and organizers repeatedly visited Respondent's office and construction sites. The Union began picketing Respondent's facilities in May 2000 and continued to do so until only a few days prior to the trial. General Counsel has alleged numerous incidents in which Respondent called the police and attempted to cause the arrest of pickets. Respondent is also alleged to have caused the arrest of one picket and threatened to cause the arrest of other pickets and union agents. The National Labor Relations Act (NLRA) guarantees employees "the right to self-organization, to form join, or assist labor organizations" and makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees" in the exercise of their Section 7 rights, and Section 8(a)(1). In a 1992 case, the Supreme Court dealt with the issue of access by nonemployees to an employer's property.⁸ The Court held that an employer did not commit an unfair labor

practice by barring nonemployee union organizers from its property. The Court explained that by its plain terms, the NLRA confers rights only on employees, not on unions or their nonemployee organizers. Citing *NLRB v. Babcock & Wilson Co.*, 315 U.S. 105, 113 (1956), the Court further noted that, as a rule, an employer cannot be compelled to allow nonemployee organizers onto his property. The Board, however, has noted that this precedent presupposes that the employer at issue possesses a property interest entitling it to exclude other individuals from the property. In situations involving a purported conflict between the exercise or rights guaranteed by Section 7 of the Act and private property rights, an employer charged with denial of union access to its property must meet an threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. If it fails to do so, there is no actual conflict between private property rights and Section 7 rights, and the employer's actions therefore will be found violative of Section 8(a)(1) of the Act. *Wild Oats Markets, Inc.*, 336 NLRB 179 (2001); *Gary E. Caulkins*, 323 NLRB 1138 (1997) *enfd.* 187 F.3d. 1080 (9th Cir. 1999) *cert. denied* 529 U.S. 1098 (2000); and *Bristol Farms, Inc.*, 311 NLRB 437, 438-439, (1993). To meet its threshold burden, an employer must show that it had a property interest in the area of the picketing or handbilling, and that the union activity was outside the scope of the public easement, such that the employer was entitled to exercise its property interest and expel those engaging in union activity. See *Snyder's of Hanover, Inc.*, 334 NLRB 183 (2001).

In *O'Neil's Markets, Inc.*, 318 NLRB 646 (1995), the Board reiterates the employer's threshold burden to show the property interest which entitled it to exclude the union representatives from its property. In determining whether an adequate property interest has been shown, it is appropriate to look not only to relevant documentary and other record evidence, but also to the relevant state law. In *O'Neil's Markets*, the Board looked specifically to the applicable Missouri law defining "easement" as a nonpossessory interest. The law specified that the easement owner who finds it necessary to resort to the courts for protection of his easement is debarred from actions traditionally established for the protection of a possession, such as trespass, writ of entry and ejectment, because the easement owner does not have the prerequisite possession. Finding the employer had, at best, a nonexclusive easement interest for limited business purposes, it had not established that this interest carried the legal authority to exclude.

The Union asserts in its brief that there is a public easement, which runs across the front of Respondent's office property. Crawford testified that the union pickets picketed in the easement area until October, when the prosecutor's office told them they could picket in the street. Respondent's photographic exhibits confirm the pickets' presence in the easement area. The Union asserts that Respondent does not have a property interest that allows it to exclude members of the public from this public easement area. In its brief, Respondent argues that pursuant to its easement with the city, Respondent is responsible for maintaining the property including watering, planting, and mowing the yard. Respondent presented no evidence at trial establishing that Respondent has an interest, entitling it to exclude indi-

⁸ *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992).

viduals from the property as envisioned by the Board the above-described cases. Respondent submits no provisions of the easement with the city or State law that would allow Respondent to bar all individuals from this easement area.

Respondent does not dispute that it called the police when the organizers first visited its office on May 4. In its brief, Respondent argues that Klima's call to the police was made before the men identified themselves or their purpose. Respondent argues that the call to the police was not placed because of known union activity and therefore, is not a violation of the Act. Contrary to Respondent's assertion, Klima admitted that he recognized six of the eight organizers when they arrived at his office. The transcript of the meeting further reflects that immediately after union organizer Masten announced they were there about employment, Klima told the police in his telephone conversation he had union business agents and he had asked them to leave but they would not do so. In the same conversation, Klima announced to them "you think I'm gonna buy that shit?." He also told them "... I know this fucking game ... and I'm not gonna play it." Clearly, Klima was well aware the individuals were with the Union and were there to gain employment. Despite what they said to him, he continued his call to the police.

Respondent also argues that it did not violate the act by contacting the police on July 14. Respondent contends that it was merely contacting the police after observing a picket engage in unlawful littering. Contrary to counsel's assertion, the police report reflects that Klima did more than simply report an observance of littering. The police report contains the statement from Klima in which he not only complains about cigarette butts being thrown in his yard, but also complains about the picket signs making holes, and his contention that he had asked the pickets to leave and they had not. Clearly, Klima's report to the police on July 14 is no different than other days when he sought to have the police remove the pickets and to cease their protected activity.

Respondent further contends that General Counsel failed to prove that calls were made to the police on July 17, 18, and 19. Respondent argues that even if the calls were made, there is not sufficient record evidence to establish who made the calls and the purpose of the calls. In his testimony however, Klima does not deny that he called the police on July 17, 18, and 19. There being no evidence to the contrary, it is reasonable that Respondent contacted the police on these dates. Klima admitted that he called the police on August 11, because the pickets were turning the grass into a mud pit. He does not deny that he called the police in early May, on May 23, and on June 5 as testified by Castleberry.

Based on the Board's precedent as set out above, I find that Respondent violated Section 8(a)(1) of the Act by calling the police on May 4 and in early May to have union organizers and pickets removed from public property as set forth in paragraph 5(a) and (b) of the consolidated complaint. The evidence also supports that Respondent violated Section 8(a)(1) by threatening a union organizer/employee with arrest, attempting to convince police officers to arrest pickets, contacting the police to seek the arrest of pickets, and causing the arrest of a picket as

alleged in paragraph 5(g), (l), (q), and (r) of the consolidated complaint. *Gary E. Calkins*, 323 NLRB 1138 (1997).

2. Specified and unspecified threats to union agents and organizers

Both Murphy and Crawford testified to having heard Klima's conversation to Mumau on May 11. During his testimony, Klima did not deny his instructions to Mumau to tell Crawford to "get the fuck off his job or he was going to blow his head off." This allegation is much akin to the old question of whether a tree falling in the forest makes a sound if no one is present to hear it. While Crawford and Murphy testified they were able to hear Klima and Mumau's conversation over the Nextel phone, there is no evidence that Klima intended for this conversation to be overheard by anyone other than a supervisor. When Crawford asked Mumau to repeat what Klima had said, Mumau declined to do so, stating that Crawford didn't want to know. I simply don't find this conversation between Klima and Mumau to be directed to an employee or union agent and thus not violative of Section 8(a)(1) as alleged in complaint paragraph 5(f).

The remaining allegations of threats to union organizers and employees involved Klima's alleged "going to snap" remarks. Four of the union organizers allege Klima stated in his rooftop conversation on May 23 that they would not like it when he snapped. Union organizer Garrison testified that at an unspecified time in June, Klima told him "One of these days I'm going to snap and when I do, I don't know what is going to happen." In his testimony, Klima explained this period of time was especially stressful for he and his wife. Klima testified without contradiction, that within an 11-day period beginning June 12, he and his wife lost three parents through death. I don't find the alleged statements sufficient to constitute threats violative of the Act. During the same rooftop conversation alleged on May 23, the union organizers do not dispute that Klima talked with them about Murphy's being a good employee. There was no mention of his union activity as a salt or mention about the Union's picketing. It is certainly conceivable that Klima's comments on either occasion were simply his own frustration with his circumstances and his feeling that he was going to snap with all the added pressures in his life. Accordingly, I do not find the evidence supports the violation as alleged in complaint paragraph 5(m).

3. Interference with the union's picketing

a. Allegations of videotaping pickets

David Castleberry testified that in early May and also on June 5, Klima videotaped the pickets in front of his office. Klima does not dispute that he did so. The Board has previously found that absent proper justification, it is unlawful to photograph or videotape employees engaged in Section 7 activity because such conduct has a tendency to intimidate employees and plant a fear of reprisal. *F. W. Woolworth Co.*, 310 NLRB 1197 (1993). The Board has also recognized that the taking of pictures or videotaping to document trespassory activity for the purpose of making out a trespass claim is an acceptable justification. See *Ordman's Park & Shop*, 292 NLRB 956 (1989). Photographing in the mere belief that "something

‘might’ happen does not justify Respondent’s conduct when balanced against the tendency of that conduct to interfere with employees’ right to engage in concerted activity.” *Casa San Miguel, Inc.*, 320 NLRB 534 (1995). The Board noted in *Sonoma Mission Inn & Spa*, 322 NLRB 898 (1997), that otherwise an employer could always assert a subjective “fear” of trespass and obtain carte blanche to engage in inherently intimidating conduct. More recently the Board further noted that the employer must have more than a mere belief that something might happen; it must have an objective basis. The employer must demonstrate a reasonable basis to expect misconduct. See *Saia Motor Freight Lines* 333 NLRB No. 87 (2001). While Klima made repeated complaints to the police about the picketing, Respondent has failed to show an objective basis for justifying this conduct. According, I find the conduct alleged in complaint paragraph 5(c) and (p) to be violative of Section 8(a)(1) of the Act.

b. Harassing pickets with the water sprinkler

The consolidated complaint alleges three incidents involving Roger Klima’s turning on a sprinkler system where the pickets were standing. These incidents are alleged to have occurred in June and August. In its brief, Respondent argues that pursuant to his easement with the City, Klima is responsible for maintaining the property including watering, planting, and mowing the yard. Respondent further asserts that each time Klima watered his lawn the picketers observed Klima setting up the sprinklers and each time Klima verbally advised the picketers he was going to water his lawn. Respondent maintains that General Counsel failed to establish that the reason Klima watered his lawn was for an unlawful purpose.

Pfister testified that it was common for the sprinklers to be turned on when the pickets were picketing on the easement. He maintained that often he sprinklers were left on the entire day. Chris Williams recalled one day when Klima held the hose and pointed it directly on the pickets. When Williams told the other picket to call 911, Klima refrained from turning on the water. Williams also recalled that when Klima turned on the sprinklers on August 11, there had been no advance notice that he was going to do so. Castleberry testified that prior to turning on the sprinklers on June 5, he shouted to the pickets “I wouldn’t sit there if I was you.” Castleberry also explained that the sprinklers were set up to cover not only the easement area but the water also extended out to cover most of the double lane driveway entrance. Only a small area in the center of the drive was left dry. When Klima turned on the sprinklers on June 5, the pickets left the easement and went out to picket in the dry area in the driveway. Castleberry testified that Klima then videotaped the pickets while they were standing in the driveway. When the police arrived later, Klima showed them the videotape of the pickets in the driveway and argued that the pickets did not have a right to be there and he wanted them “out of there.”

Respondent asserts it had a responsibility to maintain the easement area and this included caring for the grass in that area. Klima maintains that during this period of picketing in the summer of 2000, the pickets in their daily picketing damaged the grass. Respondent submitted evidence to show that it had

verticut the grass in the easement area and planted new grass seeds. Respondent maintains that it was necessary to water the grass easement area because of the time of the year and also to water the newly planted grass seeds. Respondent submitted photographs showing the pickets walking in circles in the obviously wet easement area. Respondent’s Exhibit 12-c depicts 10 pickets wearing rain gear and walking in a circle in the wet easement area on September 29. The photograph, taken on September 29, also reflects that a significant area of the street or driveway is also wet. Klima testified that after the verticutting and reseeded of the grass in the easement area, he erected a sign in the yard. The sign advised “New seed please keep off.” Despite the sign, the picketers continued to picket in the easement area. Respondent submitted three photographs depicting the condition of the easement on September 30. The photographs, received into evidence as Respondent’s Exhibits 22(a) through (c), show the easement area to be almost totally mud with no grass remaining. Respondent also submitted into evidence photographs taken by the Union on October 2 and 5. The photographs reflect that while Respondent had erected stakes and string to cover the easement area, the pickets continued to picket on the easement.

The numerous photographs submitted into evidence and extensive testimony reflect an ongoing “war of wills” between the Union and Klima. Beginning in May and continuing throughout the summer, the Union positioned pickets outside Respondent’s Olathe office. The numbers varied from 1 or 2 up to as many as 10 at a time. At one point during the picketing the Union included a picket in a bright red rat costume with “Roger the Rat” printed on the front of the costume.⁹ Feeling targeted and harassed by the Union, Respondent appeared to seek out any possible means of ridding itself of the Union presence. Daryl Love credibly testified that Klima enlisted his services in the ongoing struggle. I find Love to be credible in his testimony that Klima asked him to spread the horse manure in the picketing area. While Klima testified that he had advised Love not to spread the manure, his own affidavit to the Board belies his credibility. In his affidavit to the Board, Klima contends that he did not know who had placed the manure on the yard. Based on the entire record, I find that Klima utilized the sprinklers to rid himself of the picketers and thus to discourage the picketers in the exercise of their Section 7 rights. Accordingly, I find the allegations of complaint paragraph 5 (o) and (u) to be violative of Section 8(a)(1).

c. Allegations of attempt to strike pickets with a vehicle

Castleberry testified that as he was picketing on May 23, Klima abruptly pulled his vehicle into the drive and almost struck him. Castleberry contends that he had to jump out of the way to avoid being hit. Crawford testified that as Klima was driving past him on May 26, he swerved and almost hit him. As corroboration, General Counsel submitted a written statement signed by Castleberry, Oldham Hudson, Winn and Crawford. In its brief, Respondent asserts that the pickets had not

⁹ Klima recalled Crawford’s telling him that he would look good in the suit. Crawford told Klima that he should come out and wear the suit as it had his name on it.

observed Klima on May 23 and he had come a “little close to where they were standing.” Respondent points out that despite Crawford’s assertion that he was almost hit on May 26, he had been able to take a photograph of Klima’s vehicle. The photograph of the front of Klima’s vehicle was admitted as Respondent’s Exhibit. 9. It is apparent that Klima’s vehicle was close to Crawford, however the angle of the photograph reflects the vehicle was not turned toward the photographer. Accordingly, the Union’s own photograph contradicts the allegation that Klima attempted to strike Crawford or that he came within 16 inches of doing so. I also find the evidence insufficient to support that Klima attempted to strike Castleberry on May 23. While Castleberry asserts that Klima tried to strike him on the morning of the 23, there is no evidence that he reported this incident to the police when they came to the picket site later in the day. Thus, I do not find the overall evidence supports the allegations contained in paragraph 5(k).

d. Complaint paragraph 5(j)

Murphy testified that as he was working on May 22, union pickets were on the jobsite. Murphy recalled that Mumau told him that if Crawford came on the jobsite that day, Mumau was going to have him arrested. Mumau instructed Murphy to notify him if Crawford or other union agents returned to the jobsite so that Mumau could have them arrested. Respondent did not present Mumau to deny Murphy’s testimony. Accordingly, I credit Murphy’s version of the May 22 conversation and find such conduct to be violative of Section 8(a)(1) of the Act.

4. Interrogation of employees

General Counsel alleges that Respondent engaged in numerous incidents of interrogation of employees about their union activity and the union activity of others. David Wilson testified that when he called Klima to inquire about a job on May 5, Klima asked him if he were a union organizer. When Lee Murphy and Art Janke applied for work on May 11, Klima asked them if they were union members. While he did not inquire as to whether they were union organizers, he told them about the application by the organizers and how he had told them to “get the fuck out of his office.” Murphy and Janke assured him they were not organizers. After Murphy announced that he was a union “salt” on May 23, Klima inquired, “I thought you weren’t an organizer.” Murphy testified that when he went in to pick up his check on the May 26, Klima referred again to the employment interview on May 11, when Murphy had told him that he was not an organizer. The transcript of James Hide’s telephone conversation with Klima on June 19 includes Klima’s interrogation of his union membership. Klima does not deny that when he interviewed Hide on June 20, he asked Hide if he were a union organizer.

Respondent asserts that Klima routinely asked applicants questions regarding whether they are affiliated with the Union. Respondent submits the questions are not designed to weed out union applicants, but to ascertain an applicant’s skills and experience as well as to identify a potential employment reference. Respondent argues that the questions are not used to threaten applicants. I credit Murphy’s testimony concerning what Klima told he and Janke about the union organizers. By explaining that he told the organizers to “get the fuck out of his

office” and then inquiring if Murphy and Janke were union members certainly connotes coercive interrogation. The Board has long held that questioning concerning union preference in the context of job applications and interviews is inherently coercive and unlawful even when applicants are hired. See *Gilbertson Coal Co.*, 291 NLRB 344 (1988). Based on the entire record, I find that Klima’s questioning of Hide, Murphy, and Wilson all constituted interrogation in violation of Section 8(a)(1) of the Act. *M.J. Mechanical Services*, 324 NLRB 812 (1997).

General Counsel submits the affidavit of Kevin Sachuvich to further support complaint paragraph 5(n). Sachuvich testified to the Board Agent that Brent Mumau approached him on July 20 and asked if he were a union salt. Because of his death prior to the hearing, his testimony was presented through the Board affidavit. Respondent did not present Mumau to deny this allegation. In resolving the merits of this allegation, I am faced with two absent participants to this conversation. The Board has previously noted that the affidavit of a deceased witness may be admitted into evidence provided, however, that the statements therein are considered only with the utmost care and caution and closest scrutiny, and that weight may be given to them only when they are wholly corroborated by clear and convincing testimony of other witnesses or documentary evidence. See *Custom Coated Products*, 245 NLRB 33 (1979). While Respondent did not deny this allegation, I have not found the requisite corroboration as envisioned by the Board’s previous decisions in this matter. I have evaluated the evidence and I have not found it to be sufficiently “consistent with extraneous, objective, and unquestionable facts” to accord it full reliance. See *American Tissue Corp.*, 336 NLRB 435 (2001). Accordingly, I find that the evidence does not support the allegation involving the Mumau/Sachuvich conversation of July 20.¹⁰

Complaint paragraph 5(i) alleges that Brent Mumau interrogated employees on May 19, at the Metcalf jobsite. Murphy testified that on this date, Mumau asked “are you sure you are not a union organizer?” Respondent did not present Mumau to deny this allegation. Crediting the testimony of Murphy, I find that Mumau interrogated Murphy on May 19 in violation of Section 8(a)(1) of the Act.

5. Solicitation of surveillance and instruction not to talk with the Union

When Klima hired Murphy and Janke on May 11, he instructed them not to tell the Union they had been hired. After union organizer Crawford left the jobsite on May 18, Mumau instructed Murphy to let him know if Crawford came back to the site. Mumau explained that if Crawford did so, Mumau was going to have him arrested for trespassing. Klima did not deny his statement to Murphy and Janke and Mumau was not presented to testify concerning his alleged statement to Murphy. Finding no basis to discredit Murphy’s testimony in this regard, I find the record supports that the alleged statements were made

¹⁰ Sachuvich also includes in his affidavit that he was accused of being a union “salt” by Mumau on the 24th when he was sent home early. Relying upon the same rationale, I do not find the evidence supports complaint par. 5(s).

by Klima and Mumau. I further find the evidence supports the allegations included in complaint paragraphs (e)¹¹ and (h).¹²

6. Respondent's October 2, meeting with employees

The consolidated complaint includes four allegations of Section 8(a)(1) that were alleged to have occurred during Respondent's October 2, meeting with employees. Klima's remarks during the meeting were made in dialogue form and certainly there was no prepared text for any of his remarks. Because of the nature of the interchange, the actual words spoken are not boldly violative. One must go one step beyond the actual words spoken to an analysis of the message conveyed through the words. Klima does not state in his meeting that he is not going to hire union affiliated employees. He does, however, appear to communicate his concern that while he has a lot of work coming up he may not be hiring again. He references the fact that the Union would be looking through the paper at employment ads and calling about jobs. He expresses his concern that he would again get similar applicants as he had received previously. An employer's telling employees that it has refused to hire applicants because of their union activities or sympathies is without question a violation of Section 8(a)(1).¹³ Though not using those exact words on October 2, Klima clearly conveyed the same message to his employees in violation of the Act.

General Counsel also alleges that during this same meeting, Klima told employees that he was changing its hiring procedure in order to avoid hiring union affiliated employees. Klima's comments in this area are somewhat contradictory. During a portion of the speech, both Sharon and Roger Klima clearly explain that Respondent cannot change company policies because of the presence of the Union. Later, however, he explains that he has added new language to the employment applications that will permit him to discard the application after 2 weeks. He explains this is for purposes of dealing with the union applicants. Klima's later statement appears to neutralize his earlier assertion that he could not change policy because he would be discriminating against the Union. He then confirms that he has changed the process to deal with the union applications. His comments thus communicate to employees that he has changed the hiring procedure to avoid hiring Union affiliated employees in violation of Section 8(a)(1) of the Act.

Klima also talks with employees during the meeting about the necessity of enforcing rules more consistently. He explained that the Union forces him to do so because of the issue of discrimination. It is unlawful for an employer to threaten its employees with stricter enforcement of work rules to discourage their support for the union.¹⁴ While the threat may not be artfully advanced, Klima's statements to his employees on October 2, communicate this threat to them.

During this same meeting of October 2, Klima shares his opinion that the Union has been reporting him to OSHA. He

adds that when Respondent gets the snitch in the company who has been telling the Union about the location of Respondent's worksites, OSHA will come back looking for the wrong clothing. An employer's statement to employees that creates the impression that their union activities are under surveillance violates Section 8(a)(1) of the Act. See *Exceptional Professional Inc.*, 336 NLRB 234 (2001).

Accordingly, the record evidence as a whole supports a finding that Respondent violated Section 8(a)(1) as alleged in complaint paragraph section 5 (v), (w), (x), and (y).

7. Interference with union activity on the jobsite

General Counsel submits that Respondent interfered with union activity on July 25, by forcing union organizers to leave the jobsite, and ordering the union organizers not to talk to employees. General Counsel presented evidence that organizers Hudson and Crawford appeared at the Metcalf jobsite on July 25, where Respondent was performing subcontracting work. Although Mumau initially told them to leave, they were able to verify they had permission from the general contractor and Mumau relented. Crawford and Hudson maintained that later Mumau told them they were going to have to leave the roof area because the access ladder was to be removed. General Counsel further relies upon the affidavit of Sachuvich. Sachuvich contended that after Crawford and Hudson left, Mumau announced, "The only reason the ladders were taken was to get those fucking union guys off the roof."

The Board has previously found that an employer lacking the right to exclude others from certain property violates Section 8(a)(1) when it removes Section 7 actors from those areas. The threshold question is thus whether the employer has a sufficient property interest entitling it to remove those engaged in Section 7 activity. See *Weis Markets Inc.*, 325 NLRB 871, (1998). The uncontroverted evidence indicates that Crawford and Hudson were on the jobsite with the permission of the general contractor. Respondent therefore does not have the requisite property interest to remove them from the jobsite. As referenced above, I am hesitant to rely on Sachuvich's affidavit as the sole basis for finding a violation. In this instance, however, the total record evidence, which includes the testimony of Crawford and Hudson as well as the absence of any denial by Mumau, lends itself to a finding of unlawful conduct. Accordingly, I find that by the conduct alleged in complaint paragraph 5(t), Respondent has violated Section 8(a)(1) of the Act.

8. Alleged 8(a)(3) violations

a. Respondent's failure to hire the applicants

The Board's pivotal decision in *Wright Line*¹⁵ sets out a test of causation for all cases alleging violations of Section 8(a)(3) turning on employer motivation. While the analysis was articulated in the context of an employer's discharge, it may also form the framework for an employer's failure to hire. Under *Wright Line*, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivat-

¹¹ *Manno Electric, Inc.*, 321 NLRB 278 (1996).

¹² *McGaw of Puerto Rico, Inc.*, 322 NLRB 438 (1996), enf. 135 F.3d 1 (1st Cir. 1997).

¹³ *Smith & Johnson Construction Co.*, 324 NLRB 970 (1997).

¹⁴ *Mid-Mountain Foods, Inc.*, 332 NLRB 229 (2000).

¹⁵ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

ing factor in the employer's decision. In the more recent *FES*¹⁶ decision, the Board imposes on the General Counsel the burden to show "(1) that the respondent excluded applicants from a hiring process, and (2) that antiunion animus contributed to the decision not to consider the applicants for employment." Once the General Counsel has met both prongs of the *FES* test, the burden shifts "to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation." The employer's failing to meet this burden; the Board will find a violation.¹⁷

The Board also sets out the test to establish an unlawful refusal to hire:

1. respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct;
2. the job applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination, and
3. antiunion animus contributed to the decision to not hire the applicants.

General Counsel alleges that Respondent refused to consider for hire and refused to hire Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominquez, and Oscar Cross. Respondent distinguishes the alleged discriminatees in a number of ways.

Respondent argues that General Counsel's inclusion of Garrison, Masten, Simmons, and Schropshire among the alleged discriminatees is not supported by the facts. In its brief, Respondent submits that while Masten, Garrison, Schropshire, and Simmons were given applications by Klima, they never submitted the applications for employment and as such, they were not bona fide applicants. Respondent cites *Bay Electric, Inc.*, 323 NLRB No. 20 (1997), where the Board dismissed a failure to hire allegation when the General Counsel failed to establish that the alleged discriminatees applied for the job. The employer in *Bay Electric*, however, demonstrated an established procedure of requiring applicants to fill out their applications in person. By contrast to the Bay Electric employer, Respondent has not established a requirement that applicants for employment submit written applications. The evidence supports that while Respondent did not have such a requirement, Klima attempted to create the appearance of having such a policy. Daryl Love testified that while he was initially hired in 1998, he did not fill out an employment application until October 2000. He recalled that Mumau came to the Great Mall jobsite in October and spoke with Love and other employees on the job. Mumau explained that before the employees could get their paychecks they had to fill out employment applications. Mumau distributed the application forms, pens, and the appropriate application dates they were to insert on the application. The individual hire dates were included on sticky notes and given to each em-

ployee. Respondent did not present Mumau to deny this alleged incident. Finding no evidence to the contrary, I credit the testimony of Love. Accordingly, it appears that Respondent had no established practice of requiring applicants to submit a written application before their hire. The fact that Respondent attempted to fabricate records to give the appearance of such a practice belies Respondent's assertion that it did not hire Masten, Garrison, Schropshire, or Simmons because of any failure to submit written applications. Both Garrison and Masten testified they made repeated calls to Respondent's office to make arrangements for the return of their written applications. They testified Klima never returned their calls. Schropshire testified that he returned his application to Respondent's office on May 5 and spoke briefly with Klima while there. Simmons testified that following his visit to Respondent's office on May 4, he completed the employment application for Corporate Interiors. He confirmed, however, that he neither returned the application nor had further telephone contacts with Respondent. On cross-examination, he explained the sole reason he had not followed up on his application was the way in which Klima treated the applicants during their visit to Respondent's office on May 4.

The transcript of the union organizers' visit to Respondent's facility reflects the tone of their conversation and interchange. Although recognizing a number of the individuals as union business agents, Klima continued his call to the police. During the conversation he told the agents that he knew their "fucking game" and he wasn't going to play it. He also told them to "go down that fuckin' road right over there and take a left and there, there's some water down there and you guys can jump in it, how's that." In this first conversation, Klima leaves little doubt that he has no intention of hiring these individuals. The Board has noted that a customary prerequisite to an unlawful refusal-to-hire allegation is evidence that the alleged discriminatee has sought work with the respondent. Actual application is not required, however, where applying would be futile. *Sunland Construction Co.*, 311 NLRB 685 (1993). *Nelson Electric Contracting Corp.*, 332 NLRB 179 (2000). Accordingly, I find no merit in Respondent's argument that these individuals were not bona fide applicants.

Respondent contends that while Winn, Darrow, Hudson, and Crawford were all interviewed by Klima and offered employment, they each rejected the offer. Respondent asserts that these four applicants all expressed a desired salary well above the range routinely paid by Respondent. Respondent maintains that all four men turned down offers of employment at a rate of pay consistent with Respondent's established pay practices.¹⁸ Klima testified that he spoke with Winn, Crawford, Darrow, and Hudson by telephone sometime after they made their initial inquiry for employment on May 4. During these telephone calls, he gave them his verbal skills test and then offered them employment at \$15 an hour. Each of these individuals denies

¹⁶ 331 NLRB 9 (2000).

¹⁷ *Colburn Electric Co.*, 334 NLRB 532 (2001).

¹⁸ I find the circumstances of this case distinguishable from those in *Kelly Construction of Indiana, Inc.*, 333 NLRB 1272 (2001), where the employer made the decision to hire based upon a neutral application of legitimate and nondiscriminatory policies. One such policy was the preference for hiring applicants who were accustomed to earning wages within the range that the employer would pay.

any such test was administered or that any such offer of employment was made. Crawford recalled Klima's telephoning him in December and asking if he would work for \$15 an hour. Although Crawford said that he would, Klima said that he would get back with him. Crawford asserts that Klima never called him. On the basis of the entire record, I do not find Roger Klima to be a credible witness. The transcript of the May 4 meeting reflects that the application of these union organizers caused considerable distress to Klima. Because of the significance of these applications, it is reasonable that he would have had very specific recall about his later conversations with these applicants and his offers of employment to them. His recall of when he spoke with them changed throughout the course of his testimony. He could not recall with any certainty the circumstances of when he spoke with them to offer them jobs. While he admits that he spoke with them on a later date, he admits that he backdated their alleged skills test to May 4.

Respondent also argues that Klima interviewed Pfister, Domínguez, Williams, and Cross and gave them his verbal skills test. In its brief, counsel for Respondent submits that Klima offered them employment and the individuals all rejected his offer. Klima testified that he administered the skills test to these four individuals on the date of their application. He describes his going out to the area of picketing and seeking out each person for an individual conversation. During this conversation, he maintains that he gave the 20-question skills test and then offered them employment. While he presents this version, he does not dispute the Union's tape recording of his conversation between he and the pickets on September 14. The tape recording reflects that Klima threw out to the group of pickets and Crawford some of the skills that he thought were essential in performing the work. The tape recording documents Klima's talking with the individuals as a group and shows no opportunity for Klima to have pulled them individuals aside for their individual interviews. I find Klima's testimony to be incredible in this regard. While counsel for Respondent argues that Klima offered the September 14 applicants employment, Klima's testimony contradicts this assertion. Klima admits that while he told these applicants that he would give them a call if something came up, he never called them. At one point in his testimony, Klima maintained that he offered all four of the September 14 applicants' jobs at \$15 an hour. Then later he stated that he would not have hired them regardless of what money they would have taken.

Respondent's counsel argues that all four of the September 14 applicants wore tee shirts reflecting they were "anti-Corporate Interiors." Counsel states that it is hard to imagine any employer who would take such applications seriously or even consider hiring an individual who demonstrated such a lack of respect. Additionally, counsel maintains the intended message conveyed by the tee shirts alone, was a legitimate business reason for their not being hired. Respondent also submits that even if the four applicants had not worn the disrespectful shirts and had agreed to work for wages consistent with the company's hiring practices, Respondent would not have hired them because of the damage to Respondent's property. I do not find merit in Respondent's argument. Despite counsel's alternative rationale for a failure to hire the Septem-

ber 14 applicants, Respondent also contends that it offered employment to them. Respondent either offered them employment or it did not offer them employment. When the applicants came into the office on September 14, to submit their applications, Sharon Klima was outspoken in her feelings that the shirts were rude and inappropriate. Certainly, Respondent found these shirts to be offensive. The mere fact, however, that messages worn by employees may possibly make a negative impression on customers and suppliers, does not outweigh the employees' Section 7 right to wear the items.¹⁹ Employees in their protest of Respondent's alleged unfair labor practices wore these shirts. Respondent has advanced no evidence that the wearing of these shirts hindered production, caused disciplinary problems, or had any other consequences that would constitute special circumstances under established Board precedent.²⁰ Although Respondent cites in its brief the Union's damage to the grass as a basis for denying employment to the September 14 applicants, Klima admitted that he had not refused to hire anyone because of a belief that they had damaged his grass. Accordingly, I find the various reasons by Respondent for its failure to hire the September 14 applicants are nothing more than pretextual.

In defense of the allegations of its failure to consider for hire and its failure to hire these 12 applicants, Respondent contends that it gives all employees a verbal skills test. Any offer of employment will be based upon the applicant's skills demonstrated in the skills test. Klima maintained that he had given this same test to all applicants since he first began the company. Respondent submitted neither employees nor other supervisors to corroborate such a practice. Klima's testimony is the only evidence of any such practice. Respondent videotaped the interviews of three applicants. The tapes, however, do not contain the administration of the skills test. When confronted on cross-examination, Klima responded that he must have given the tests while he was not recording.

In its brief, Respondent asserts that even if it is found that Respondent did not make a job offer to Winn, Darrow, Crawford, Hudson, Williams, Pfister, Cross, and Domínguez, the General Counsel has still failed to establish animus. Respondent contends that the lack of animus may be established by its having hired a significant number of union applicants over the course of its hiring. Klima testified that he was aware at the time he hired each of these individuals they were members of the Union. In a recent case decided by the Board, the respondent made a similar argument. See *Fluor Daniel, Inc.*, 333 NLRB 427 (2001). The respondent argued that its hire of numerous employees, whose applications reflected union affiliation, negates any negative inference. The Board rejected that assertion, noting that it is well established that an employer's failure to discriminate against all applicants in a class is not a defense. There is a significant difference between past union affiliation and notice of intent to organize. Where applicants who demonstrated such an intent were uniformly excluded from consideration, hiring persons with attenuated union links is inadequate to refute the inference of hostile motive.

¹⁹ *Mead Corp.*, 314 NLRB 732 (1994).

²⁰ *Caterpillar, Inc.*, 321 NLRB 1178 (1996).

I have considered the evidence in light of the Board's analysis in *FES* and find that General Counsel has met its burden. The evidence shows that Respondent clearly had concrete plans to hire employees from May 4 throughout the period in which the 12 individuals applied for work. On May 1, Respondent ran an ad in the newspaper seeking metal stud and drywall employees. General Counsel submitted additional newspaper ads that were published through August 19. During the summer of 2000, Respondent also placed a sign in front of its office soliciting applicants. It was this sign that Klima covered in part by spray paint after the pickets applied for work on September 14. During the October 2 meeting with employees, Klima mentioned that he planned to hire again but was concerned about the Union reading the newspaper ads. Respondent does not dispute that it hired 16 employees between May 4 and November 27. Thirteen of these employees were hired between May 4 and October 5.

In the *FES* analysis, the Board also looks to the experience or training of the applicants. General Counsel submitted extensive record testimony to establish the experience and training of the individual discriminatees. Darrow had 18–19 years field experience, including metal stud, drywall, and acoustical ceiling work. Garrison testified that he had been a carpenter since 1978 and had several years' experience performing metal stud and drywall installation. Schropshire had at least 1 year of metal stud and drywall experience during his 15 years experience as a carpenter. Both Masten and Crawford completed the apprenticeship-training program and had 2 and 5 years experience, respectively, in metal stud and drywall. Hudson testified that he had 4 years experience in metal stud and drywall and at the time of the hearing he was working as a foreman for an employer performing such work. Winn also completed the union apprenticeship training program and had several years' experience installing metal studs, drywall, and acoustical ceilings. During the 15 years of experience as a carpenter, Simmons had several years' experience performing metal stud and drywall work. Williams testified that he had completed the apprenticeship program and had approximately 5 years experience with metal stud and drywall installation. Cross worked for 6 years as a carpenter and also had metal stud and drywall installation experience. Pfister had been a journeymen carpenter for more than 15 years and had experience performing metal stud, drywall, and acoustical ceiling work. Dominquez did not testify concerning his experience and training. Crawford testified that he had worked with Dominquez and estimated that Dominquez had about 3 years experience in metal studs and drywall. Based on the testimony of the applicants, it is apparent that they had significant experience in the work at issue. I also note that while Respondent argues he could only pay the applicants \$15 an hour, Respondent does not contend that the applicant's skills precluded his employing them to do the metal stud and drywall work.

The General Counsel has also successfully demonstrated that antiunion animus was a contributing factor in Respondent's failure to hire these discriminatees. The tape-recorded conversations are replete with Klima's disdainful comments about the Union and his animosity toward the union organizer applicants. There is no question that Klima had a less than neutral feeling

about the Union's organizational efforts. Clearly, he felt victimized and expressed this in conversations with individual employees and in his group meeting with employees in October. Klima does not deny that he called the police when the organizers first came to his facility and continued to contact the police thereafter. When union organizer Schropshire called Respondent's office and spoke with Sharon Klima, she told him that the union organizers were just trying to cause trouble for Respondent. She told him that Respondent was not interested in hiring any "reorganizers." She made it clear that Respondent did not want to hire "somebody that's gonna come in and try and reorganize my business" and that Respondent intended to remain nonunion. When Klima interviewed Murphy and Janke, he bragged that he had "told the union workers to get the fuck out of his office."

Accordingly, General Counsel has met its burden in demonstrating that Respondent excluded these applicants from the hiring process and antiunion animus contributed to the decision not to consider the applicants for employment. Further, I do not find that Respondent has met its burden to show that it would not have considered the applicants even in the absence of their union activity. As a defense, Respondent denies that it did not fail to consider these individuals for hire, but in fact, made offers to eight of the applicants. These offers were alleged to have been made in the context of interviews in which Klima administered a skills test to them. I do not find Klima to be a credible witness. The record supports that Klima's alleged interviews and tests are contrived and fictitious. Klima was the only witness called in support of Respondent's case. I found his testimony to be not only contradictory but implausible. It is apparent that Klima struggled through a long summer frustrated by the Union's picketing. The credited record evidence of 8(a)(1) violations demonstrates the extent of antiunion animus. Many of the alleged 8(a)(1) violations are not even denied. His anger for being targeted by the Union comes through in the tape-recorded comments as well as in credited testimony of other witnesses. His comments evidenced his fear that his newly founded company was in jeopardy because of the Union's organizational efforts. In a recent Board decision,²¹ Board Members Leibman and Walsh discussed the inevitable conflict between employees and the economic interests of employers. The Board noted that more than a century before, Justice Oliver Wendell Holmes prophetically rejected the view that concerted activity by workers was illegitimate because it deliberately inflicted economic harm on employers. While it is apparent that Klima's failure to hire the applicants was premised on a sense of preserving his business, the failure to do so nevertheless is unlawful. I do not credit Respondent's asserted reasons for its failure to hire the 12 discriminatees.²² Based on the entire record, I find that General Counsel has sustained its burden of showing that the Respondent was hiring and had job openings for the 12 applicants, that the applicants had the ex-

²¹ W.D.D.W. *Commercial Systems & Investments, Inc.*, 335 NLRB 260 (2001).

²² Except where stated or implied, I generally credit those witnesses supporting General Counsel's position and I generally disbelieve Klima who was Respondent's only witness.

perience and qualifications to perform these jobs, and that the Respondent's antiunion animus contributed to the decision not to hire the applicants.²³ Inasmuch as Respondent has failed to meet its burden, I must conclude that its failure to hire these individuals is premised on their protected activity and thus violative of Section 8(a)(3) of the Act.

b. Murphy's layoff

In a case involving an alleged discriminatory discharge, the General Counsel must not only show that the employee engaged in protected activity, but also show the protected conduct was a motivating factor in the employer's decision. Once that burden has been met, the burden shifts to the employer to demonstrate the same action would have taken place even absent the protected conduct. **Wright Line**, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 982 (1982); **NLRB v. Transportation Management Corp.**, 462 U.S. 393 (1983).

The record reflects that Murphy engaged in union and protected activity when he announced that he was a union "salt" on May 23. Respondent had suspected as much prior to his announcement. Murphy testified, without contradiction, that Mumau had repeatedly questioned him as to whether he was a union organizer. Murphy denied his status with the Union to both Mumau and to Klima in his employment interview. When Murphy revealed his status to Mumau on May 23, Mumau replied, "I figured it was you that was doing all of this." Just after Klima came to the jobsite, Murphy was laid off. Respondent asserts that the layoff was based upon the malfunctioning of the welder used by Murphy. Respondent did not attempt to reassign Murphy to other nonwelding work on the jobsite. When Murphy had been hired on May 11, he had done work other than welding. The layoff is also suspect in the fact that the welder was returned to the jobsite the next day and used by another employee. When Murphy went in to pick up his check on May 26, Klima reminded Murphy that he had denied that he was an organizer when he was hired. Murphy attempted to explain that he was not an organizer. Murphy explained that the Union had just asked him to do a job for them but he was not an organizer. Klima responded, "I know exactly what you're doin' and I think it sucks."

The overall evidence supports a finding that Murphy's employment was terminated on May 23 because he was a union "salt" and Respondent believed that Murphy was working with the Union to organize Respondent's employees. While Klima testified that he attempted to recall Murphy a week after his layoff, I do not credit his testimony. For reasons cited above, I find Klima's testimony to be incredible. While Murphy may have failed to tell Klima that he had taken another job after his layoff, I am not persuaded by Klima's assertions that he offered employment to Murphy within a week of layoff. Accordingly, I do not find that Respondent has met its burden of showing that it would have laid off Murphy even in the absence of his protected activity.

c. Respondent's sending Sachuvich home early

In his affidavit, Sachuvich testified that he was sent home early on July 24 after Brent Mumau accused him of being a "salty dog." As described above, neither Sachuvich nor Mumau testified. For reasons articulated earlier in this decision, I have not found sufficient evidence to support a finding of an 8(a)(1) violation in Mumau's alleged statements to Sachuvich. Finding insufficient basis to credit the affidavit testimony of Sachuvich, the record is insufficient to demonstrate that Sachuvich either engaged in protected activity or that such activity was a motivating factor in Respondent's decision to send him home early. I take special note of the fact that Sachuvich returned to work the next day as scheduled and there was no evidence of any further conversation. If Respondent sent Sachuvich home early because he was a "salty dog," it is reasonable that he would not have been allowed to return to the worksite. The fact that he did belies the argument that he was sent home on July 24 in violation of Section 8(a)(3). Accordingly, I shall dismiss this complaint allegation.

d. Respondent's change in hiring procedures

General Counsel alleges in paragraph 6(f) of the consolidated complaint that on or about October 2, 2000, Respondent changed its hiring procedure, including reducing the amount of time the applicants for employment are considered active or current, to 2 weeks. As referenced in the decision above, I have found that during the October 2 meeting, Respondent unlawfully told employees that it had changed its hiring procedure to avoid hiring union affiliated employees. While Klima may have told employees that he was making this change, there is no evidence that he did so. The overall evidence reflects that Respondent had no established procedure for requiring written applications or an established timeframe for how long applications would be maintained on file. The fact that Klima may have told the employees that he was going to initiate a 2-week period for holding applications does not support that he actually made any changes in his hiring procedures. Accordingly, I don't find that there is sufficient evidence to support this complaint allegation.

In accordance with my conclusions above, I make the following

CONCLUSIONS OF LAW

1. Respondent Corporate Interiors is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Carpenters District Council of Kansas City & Vicinity affiliated with United Brotherhood of Carpenters and Joiners of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by:

(a) Calling the police to seek the removal of Union organizers attempting to apply for jobs.

(b) Calling the police to seek the arrest and/or removal of pickets engaged in protected concerted activity.

(c) Attempting to videotape and videotaping pickets.

(d) Interrogating employee-applicants and employees about their union membership and sympathies.

²³ *American Restoration & Maintenance Corp.*, 335 NLRB 1052 (2001).

- (e) Ordering employees not to communicate with the Union.
 - (f) Threatening union organizer/employee applicants with arrest, in the presence of employees, and ordering employee-applicants to leave the jobsite.
 - (g) Soliciting employees to engage in surveillance of protected, concerted activity and union activity.
 - (h) Informing employees that union organizers would be arrested for engaging in lawful picketing.
 - (i) Instructing employees to assist Respondent in its efforts to call the police about union organizers.
 - (j) Threatening to interfere with picketing.
 - (k) Attempting to convince police officers to arrest pickets, and impliedly threatening to take personal action against pickets.
 - (l) Harassing picketers by turning on a sprinkler system where pickets were standing.
 - (m) Contacting the police and causing the arrest of a picket.
 - (n) Telling employees that it has changed its hiring procedure in order to avoid hiring Union affiliated employees.
 - (o) Telling employees that Respondent would not hire union affiliated employees.
 - (p) Telling employees that its rules would be more strictly enforced because of the Union.
 - (q) Creating an impression among its employees that their union activities and protected concerted activities were under surveillance by Respondent.
 - (r) Interfering with union activity by forcing union organizers to leave the jobsite.
4. Respondent violated Section 8(a)(3) and (1) of the Act by its refusal to consider for hire and hire applicants:

Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominguez, and Oscar Cross.

5. Respondent violated Section 8(a)(3) and (1) of the Act by its layoff of Lee Murphy.
6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
7. Except as found here, Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and that it take certain affirmative action designed to effectuate the purposes and policies of the Act.

It is recommended that Respondent be ordered to make Lee Murphy whole for any loss of benefits he may have suffered because of the discrimination practiced against him by his premature layoff and termination by payment to him a sum of money equal to that which he normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and interest computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It having been found that Respondent unlawfully discriminated against job applicants Keith Winn, Pat Masten, Tom Gar-

risson, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominguez, and Oscar Cross, it is recommended that Respondent offer them employment and make all of them whole for any loss of earnings they may have suffered by reason of the failure to give them nondiscriminatory consideration for employment, by a payment to them of a sum of money equal to that which they normally would have earned in accordance with the method set forth in *Woolworth*, *supra*, and *New Horizons for the Retarded*, *supra*.²⁴

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, Corporate Interiors, Inc., Olathe, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

- (a) Calling the police to seek the removal of Union organizers attempting to apply for jobs.
- (b) Calling the police to seek the arrest and/or removal of pickets engaged in protected concerted activity.
- (c) Attempting to videotape and videotaping pickets.
- (d) Interrogating employee-applicants and employees about their union membership and sympathies.
- (e) Ordering employees not to communicate with the Union.
- (f) Threatening union organizer/employee applicants with arrest, in the presence of employees, and ordering employee-applicants to leave the jobsite.
- (g) Soliciting employees to engage in surveillance of protected, concerted activity and union activity.
- (h) Informing employees that union organizers would be arrested for engaging in lawful picketing.
- (i) Instructing employees to assist Respondent in its efforts to call the police about union organizers.
- (j) Threatening to interfere with picketing.
- (k) Attempting to convince police officers to arrest pickets, and impliedly threatening to take personal action against pickets.
- (l) Harassing picketers by turning on a sprinkler system where pickets were standing.
- (m) Contacting the police and causing the arrest of a picket.
- (n) Telling employees that it has changed its hiring procedure in order to avoid hiring Union affiliated employees.
- (o) Telling employees that Respondent would not hire union affiliated employees.
- (p) Telling employees that its rules would be more strictly enforced because of the Union.
- (q) Creating an impression among its employees that their union activities and protected concerted activities were under surveillance by Respondent.

²⁴ Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. Section 6621.

²⁵ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(r) Interfering with union activity by forcing union organizers to leave the jobsite.

(s) Discriminatorily laying off or terminating employees because of their engaging in union activity or other protected concerted activities.

(t) Refusing to consider for employment or refusing to employ job applicants because they are members or organizers of the Union.

(u) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominquez, and Oscar Cross employment in positions for which they applied or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges to which they would have been entitled absent the discrimination.

(b) Within 14 days from the date of this Order, offer Lee Murphy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Lee Murphy, Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominquez, and Oscar Cross whole for any loss of earnings they may have suffered by reason of the discrimination against them as set forth in the "Remedy" section of this decision.

(d) Within 14 days from the date of this Order, remove from its files and remove any and all references to the unlawful lay-off and the unlawful refusals to hire and consider for hire the discriminatees named above and within 3 days thereafter notify the discriminatees in writing that this has been one and that the layoffs and the refusals to hire and consider for hire will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payments records, timecards, personnel records, and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days of service by the Region, post at its Olathe, Kansas facility, and all current jobsites and mail to all former employees employed at prior jobsites, and to named discriminatees, copies of the attached notice marked "Appendix."²⁶ Copies of the notice, on forms provided by the Regional

Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to the named discriminatees, and all current employees, and former employees employed by the Respondent at any time since May 4, 2000.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. November 23, 2001

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act by calling the police to seek the removal of union organizers attempting to apply for jobs; calling the police to seek the arrest and/or removal of pickets engaged in protected concerted activity; attempting to videotape and videotaping pickets; interrogating employee-applicants and employees about their union membership and sympathies; ordering employees not to communicate with the Union; threatening union organizers/employee applicants with arrest in the presence of employees, and ordering employee-applicants to leave the jobsite; soliciting employees to engage in surveillance of protected, concerted activity and union activity; informing employees that union organizers would be arrested for engaging in lawful picketing; instructing employees to assist in our efforts to call the police about union organizers; threatening to interfere with picketing; attempting to convince police officers to arrest pickets, and impliedly threatening to take personal action against pickets; harassing picketers by turning on a sprinkler system

²⁶ If this order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A

where pickets were standing; contacting the police and causing the arrest of a picket; telling employees that we have changed our hiring procedure in order to avoid hiring union affiliated employees; telling employees that we would not hire union affiliated employees; telling our employees that our rules will be more strictly enforced because of the Union; creating an impression among our employees that their union activities and protected concerted activities are under surveillance; and interfering with union activity by forcing union organizers to leave the jobsite.

WE WILL NOT discriminatorily lay off or terminate employees because of their engaging in union activity, or other protected concerted activity.

WE WILL NOT refuse to consider for employment or refuse to employ job applicants because they are members of the Union or organizers for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's order, offer Lee Murphy reinstatement to his former job or, if such position no longer exists, to a substantially equivalent position

without prejudice to his seniority rights or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of the date of the Board's order, offer Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominquez, and Oscar Cross employment in positions for which they applied, or if such positions no longer exist, to substantially equivalent positions.

WE WILL make Lee Murphy, Keith Winn, Pat Masten, Tom Garrison, Dallas Darrow, Gerald Schropshire, Mike Crawford, Joe Hudson, Dave Simmons, Chris Williams, Ronald Pfister, Angel Dominquez, and Oscar Cross whole for any loss of earnings they may have suffered by reason of the discrimination against them.

WE WILL remove from our files any and all references to the layoff and the refusal to hire and consider for hire, the individuals named above and to notify them in writing that this has been done and that the layoff, the refusal to hire, or consider for hire will not be used against them in any way.

CORPORATE INTERIORS, INC.